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Preface

In early 1998, the Government of Canada took a close look at the law-making process and at ways to improve the quality of draft legislation. One finding was that people involved in the law-making process did not always have enough information on the process or their role in it. Another finding was that there is a wealth of information on the law-making process, but relatively few people know about it. Two examples of this are the directive entitled *The Preparation of Legislation*, approved by the Cabinet in 1981, and the *Guide to the Making of Federal Acts and Regulations*, published by the Department of Justice in 1995.

On March 23, 1999, the Cabinet took an important step towards addressing these deficiencies. It approved an updated directive on the law-making process for federal Acts and regulations. The directive sets out the expectations of Ministers in relation to this process and generally orients the activities of Government officials in this regard. It also envisages the issuance of supplementary documents to provide detailed guidance to ensure that the Cabinet's objectives and expectations are met.

I am issuing this second edition of the *Guide to Making Federal Acts and Regulations* to promote awareness of the 1999 *Cabinet Directive on Law-making* and to provide complementary detailed guidance on these matters. We plan to continue to improve and update the material and invite you to give us your comments. A current version of the Guide will be available on the Privy Council Office Web site at http://www.pco-bcp.gc.ca

Alexander Himelfarb

Clerk of the Privy Council and Secretary to the Cabinet

Introduction

Objectives

The Guide describes the steps to be followed to transform policy into Federal Acts and regulations, which are forms of written law generally referred to as "legislation." It also outlines the roles of the participants in this process. If the process is carefully planned and competently carried out, the resulting legislation will achieve the Government's goals while adhering strictly to the principles and policies underlying our legal system.

The Guide also serves as a reference for those already involved in law-making and as a training tool for those who are becoming involved for the first time.

Audience

The main audience for this Guide consists of officials in the Government of Canada who are involved in the law-making process and who have responsibility for one or more of the following activities:

- developing policy to be implemented by legislation,
- supporting a Minister in obtaining Cabinet approval to draft legislation,
- participating in the drafting of legislation,
- managing legislative projects.

Contents

The Guide covers a broad range of activities ranging from policy development to regulation-making. It begins with the ***Cabinet Directive on Law-making***, which sets out the framework for the Government's law-making activity and the principles that govern it. The Directive is the foundation for this Guide, providing the authority for the Clerk of the Privy Council to issue it.

The rest of the Guide is divided into three parts.

Part 1 provides a framework for making laws. Chapter 1.1 deals with choosing the most effective tools for achieving policy objectives. It provides a series of questions that should be answered to make sure that a law is needed and to explore other tools. Chapter 1.2 assumes that a decision has been made to make a law and outlines the legal framework for doing so, including the Constitution and other basic laws that must be considered when preparing legislation.

Part 2 discusses in detail the making of Acts. It begins with legislative planning and management and concludes with post-enactment review. It is organized under a series of titles to help you navigate each step in the process and includes checklists and templates, as well as detailed information about particular phases of each step.
Part 3 deals with the making of regulations in a summary fashion. This process is currently under review. Readers looking for detailed guidance on it should consult:

- *Regulatory Policy* and the Policy and Process Guides of the Regulatory Affairs and Orders in Council Secretariat of the Privy Council Office http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&Page=Publications.
- *Federal Regulations Manual*, Regulations Section of the Department of Justice.

The Guide concludes with an **Appendix** listing reference material that may be useful to anyone participating in the law-making process.

Navigating the Law-making Process

The captain of a ship knows that to get from Point A to Point B successfully you need a plan, a map, a crew, a time frame, landmarks along the way, a good communications system and a bit of luck. A captain cannot operate alone or in isolation. Similarly, the law-making process works best when:

- one person has responsibility for coordinating efforts;
- expected "products" are clearly defined;
- a schedule is in place and revised as necessary;
- systems for sharing information and for reporting on progress are developed and used;
- there are clearly defined roles and responsibilities for the crew.

Whatever your role–be it subject matter expert, program official, legal adviser, drafter or manager–whatever size department you work in and whatever experience you may or may not have, *you cannot do this by yourself.*

Taking a policy and crafting it into a bill or draft regulation and then into enforceable law requires the co-ordinated efforts of dozens, if not hundreds, of people. Law-making is a complex process. It is also a crucial activity in our democracy.

Law-making is a team effort that requires planning and good management.

Cabinet Directive on Law-making

4 4

Overview

The *Cabinet Directive on Law-making* is the foundation document for the Guide. It sets out the expectations of Ministers in relation to the process for making federal Acts and regulations and generally orients the activities of Government officials in this process.

Audience

All Government officials involved in the law-making process.

Key Messages

Officials involved in law-making activities must understand the fundamentals that underlie our system of government and laws. They must also appreciate the steps involved in these activities as well as the need to plan them.

1. Introduction

The making of law is arguably the most important activity of government. This Directive describes the framework for this activity and the principles that govern it. It is of the utmost importance that departments embarking on law-making initiatives plan and manage them in accordance with this Directive and the supporting documents issued by the Clerk of the Privy Council.

This Directive replaces the directive entitled *The Preparation of Legislation*, approved by the Cabinet on April 16, 1981. Its main objectives are to:

- ensure that the Cabinet has the information and other support it needs to make sound decisions about proposed laws;
- outline the relationship between Acts and regulations and ensure that they are viewed as products of a continuous process of making law;
- ensure that proposed laws are properly drafted in both official languages and that they respect both the common law and civil law legal systems;
- make it clear that law-making initiatives can be very complex and must be properly planned and managed; and
- ensure that Government officials who are involved in law-making activities understand their roles and have the knowledge and skills they need to perform their roles effectively.

This Directive sets out principles and general directions on how these objectives are to be met.

2. Fundamentals of the Government's Law-making Activity

Constitutional Considerations

The *Constitution Act, 1867* distributes the legislative powers of Canada between the Parliament of Canada and the legislatures of the provinces (Part VI, sections 91 to 95). The legislatures of the territories exercise legislative authority through delegation from the Parliament of Canada.

Canada's system of responsible parliamentary government is based on the rule of law. This means that laws must be made in conformity with the Constitution. The Crown retains very few regulatory powers that are not subject to the legislative or law-making process. For example, regulations governing the issuance of passports or medals and honours are still made under the royal prerogative.

Parliament may delegate regulatory authority to Cabinet (the Governor in Council), a person (such as a Minister of the Crown) or a body (such as the Atomic Energy Control Board). However, this authority remains subject to the will of Parliament and regulations made under this delegated authority are referred to as subordinate legislation.

Law-making authority in Canada is subject to a number of constraints. Parliament and the provincial legislatures are limited by the constitutional distribution of powers. They are further constrained in their law-making powers by the *Canadian Charter of Rights and Freedoms*, by the existing Aboriginal and treaty rights recognized and affirmed by section 35 of the *Constitution Act, 1982*, and by certain other constitutional provisions, such as the language rights and obligations that apply to Quebec and Manitoba.

Parliament consists of three elements: the Crown, the Senate and the House of Commons. Parliament makes laws in the form of statutes or "Acts." All three elements must assent to a bill (draft Act) for it to become law. The assent of the Crown is always the last stage of the law-making process.

All money bills must, according to the *Constitution Act, 1867*, originate in the House of Commons:

> **53**. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons.

Money bills are to be introduced by a Minister of the Crown. Non-money bills may originate in the Senate. The Cabinet, which consists of the Prime Minister and the other Ministers of the Crown, plays a significant role in Parliament's law-making activity, both collectively, by approving bills for introduction in Parliament, and individually, by sponsoring bills through the stages of the parliamentary process. Cabinet Ministers are in turn supported by the officials who work in government departments.

Deciding Whether a Law is Needed

Making a new law, whether by obtaining Parliament's assent to a bill or by making regulations, is just one of several ways of achieving governmental policy objectives. Others include agreements and guidelines or, more generally, programs for providing services, benefits, or information. In addition, a law may include many different kinds of provisions, ranging from simple prohibitions through a wide variety of regulatory requirements such as licensing or compliance monitoring. Law should be used only when it is the most appropriate. When a legislative proposal is made to the Cabinet, it is up to the sponsoring Minister to show that this principle has been met, and there are no other ways to achieve the policy objectives effectively.

The decision to address a matter through a bill or regulation is made by Cabinet on the basis of information developed by a Minister's departmental officials. The information must be accurate, timely and complete. To provide it, a department should:

- analyze the matter and its alternative solutions;
- engage in consultation with those who have an interest in the matter, including other departments that may be affected by the proposed solution;
- analyze the impact of the proposed solution; and
- analyze the resources that the proposed solution would require, including those needed to implement or enforce it.

In the case of a bill, the principal means for conveying this information is a Memorandum to Cabinet, which a minister must present to obtain Cabinet approval for the bill to be drafted by the Legislation Section of the Department of Justice.

When a legislative initiative is being considered, and where it is appropriate and consistent with legislative drafting principles, related matters should be combined in one bill, rather than being divided among several bills on similar subjects. A single bill allows parliamentarians to make the most effective and efficient use of their time for debate and study in committee.

Finally, caution should be taken when considering whether to include a "sunset" or expiration provision in a bill, or a provision for mandatory review of the Act within a particular time or by a particular committee. Alternatives to these provisions should be fully explored before proposing to include them in a bill.

Relationship between Acts and Regulations

Although Acts and regulations are made separately, they are linked in several ways:

- Parliament creates Acts and through them authorizes regulations;
- a regulation must strictly conform to the limits established by the Act that authorizes it; and
- most legislative schemes depend on regulations to make them work, so an Act and the regulations should be developed together to ensure a good match.

When developing a proposal for a bill that will authorize regulations, departments should carefully consider:

- who is to have authority to make the regulations;
- which matters are to be dealt with in the bill; and
- which matters are to be dealt with in the regulations.

Ordinarily, the Governor in Council is authorized to make regulations. A rationale for departures from this practice needs to be provided in the relevant Memorandum to Cabinet. Matters of fundamental importance should be dealt with in the bill so that parliamentarians have a chance to consider and debate them. The bill should establish a framework that limits the scope of regulation-making powers to matters that are best left to subordinate law-making delegates and processes. The following principles should also be observed:

- The power to make regulations must not be drafted in unnecessarily wide terms.
- Certain regulation-making powers are not to be drafted, unless the Memorandum to the Cabinet specifically requests drafting authority for the power and contains reasons justifying the power that is sought. In particular, specific drafting authority is required for powers that:
    - substantially affect personal rights and liberties;
    - involve important matters of policy or principle;
    - amend or add to the enabling Act or other Acts;
    - exclude the ordinary jurisdiction of the Courts;
    - make regulations having a retroactive effect;
    - subdelegate regulation-making authority;
    - impose a charge on the public revenue or on the public, other than fees for services;
    - set penalties for serious offences.

Acts and regulations are interdependent and should be developed in conjunction with one another. Regulations may be drafted at the same time as the authorizing bill or after, depending on the situation. However, if regulations are an important part of a new legislative scheme, it may be helpful to begin developing draft regulations or at least a summary of the regulations at the same time as the bill to ensure consistency with the framework being established in the bill. When regulations are developed under an existing Act, care must be taken to ensure that they fall within the authority granted by that Act.

Importance of bilingual and bijural drafting

The *Constitution Act, 1867* requires federal laws to be enacted in both official languages and makes both versions equally authentic. It is therefore of primary importance that bills and regulations be prepared in both official languages. It is not acceptable for one version to be a mere translation of the other. For this reason, sponsoring departments and agencies must ensure that they have the capability to develop policy, consult, and instruct legislative drafters in both official languages. Both versions of legislation must convey their intended meaning in clear and accurate language.

It is equally important that bills and regulations respect both the common law and civil law legal systems since both systems operate in Canada and federal laws apply throughout the country. When concepts pertaining to these legal systems are used, they must be expressed in both languages and in ways that fit into both systems.

Planning and Managing Law-making Activity

The Government's law-making activity is to be planned and managed on three levels:

- centrally for the Government as a whole;
- departmentally; and
- on a project basis.

At the first level, there is a government-wide process to co-ordinate and set priorities among proposals for bills from different departments. The Minister responsible for the Government's legislative program is the Leader of the Government in the House of Commons, who is also a Minister of State. For the public service, the Privy Council Office supports the Leader of the Government in the House of Commons in this activity. In addition, a committee of Cabinet, called the Special Committee of Council, and then full Cabinet review issues requiring decisions by Cabinet as a whole. For example, the Leader of the Government in the House of Commons seeks delegated authority from Cabinet for the introduction of Government bills.

In the case of regulations, departments and regulation-making agencies must plan their regulatory agendas for coming years and prepare reports on planning and priorities. In the fall, they must also prepare performance reports. These reports are to be tabled in the House of Commons as part of the Estimates and referred to the appropriate committees of that House.

At the second, departmental level, each department manages the legislative proposals in its areas of responsibility. It must ensure that it has allocated the resources necessary to carry its proposals through each stage in the law-making process, plan for such things as consultation, and ensure that it has the capacity to formulate policy and instruct legislative drafters in both official languages. Finally, it must also plan and allocate resources for the implementation of new laws.

At the third, project level, departments must plan their law-making activities as they relate to particular bills or regulations. These activities are to be managed as projects with tools for determining what resources are needed, what tasks must be performed and what time frames are appropriate.

3. Preparation of the Government's Legislative Program

Planning the Legislative Program

Planning the Government's legislative program begins up to one year before the opening of the session of Parliament in which the various legislative items are to be introduced. Experience has shown that the planning and preparation process should be spread over the whole year, as opposed to a short period immediately before a session. This stems both from the need for long-term planning of the legislative program as a whole as well as from the established procedure for the approval of individual bills. This procedure involves three separate steps:

- Cabinet approval of the policy is sought;
- if Cabinet approves, the bill is drafted, which in many cases proves to be a lengthy and difficult process in itself; and
- approval of the Minister of State and Leader of the Government in the House of Commons is sought for introduction of the bill.

As part of the Prime Minister's June 1997 changes to the Cabinet decision-making system, the Special Committee of Council was given new responsibilities as a ministerial forum at the Cabinet committee level for discussing the Government's overall legislative planning and for specific legislative issues requiring decisions by Cabinet.

The Minister of State and Leader of the Government in the House of Commons is responsible for the Government's legislative program in the House of Commons, including examining in detail all draft bills.

Accordingly, departments and agencies whose Ministers are bringing forward legislative proposals are urged to keep in close contact with the Legislation and House Planning/Counsel Secretariat of the Privy Council Office, which provides support to the Leader of the Government in the House of Commons and to the Special Committee of Council. In particular, it is important to inform them of any significant changes in the timing of Ministers' plans to bring bills forward.

Request for Legislative Proposals

Immediately after the Speech from the Throne at the opening of each session of Parliament, the Assistant Secretary to the Cabinet (Legislation and House Planning/Counsel) will write to all Deputy Ministers and some Agency heads asking them to submit a list of the legislation that their Minister plans to propose to Cabinet for introduction in the next session. Subsequently, this legislative "call letter" will be sent twice a year (June and November) in order to deal with new or changing priorities.

The response to the request for legislative proposals should be submitted to the Assistant Secretary to the Cabinet within one month after receiving the request, or by a date specified in the request.

Review by Cabinet

The proposals are prioritized by the Leader of the Government in the House of Commons and a tentative outline of the legislative program for the next sitting, together with the assignment of priorities for the various proposals, are reviewed by the Special Committee of Council. The Leader of the Government in the House of Commons normally advises the Special Committee of Council and the full Cabinet of the updated legislative program twice a year.

4. Preparation of Government Bills

Cabinet Approval of Policy

As soon as is feasible after Cabinet has determined that a bill is to be introduced as part of its legislative program, the responsible department should arrange for the submission of a Memorandum to the Cabinet (MC) seeking policy approval and an authorization for the Legislation Section of the Department of Justice to draft the bill. The MC is to be prepared in accordance with supplementary documents issued by the Clerk of the Privy Council and is to be submitted to the appropriate policy committee of Cabinet and then to Cabinet. It should be submitted far enough in advance of the projected date for introducing the bill to allow sufficient time to draft it.

An MC should address the type of public consultation, if any, that the sponsoring Minister has held or expects to hold and should specify whether the Minister intends to consult on the basis of the draft bill. By tradition, draft bills have been treated with strict confidence before they were introduced in Parliament. However, in keeping with the Government's commitment to openness and consultation, sponsoring Ministers may wish to consult on the basis of draft bills. This consultation is intended to ensure that bills take into account the views of those concerned and it must not pre-empt Parliament's role in passing bills. Also, there may be cases where it would not be appropriate to do so for reasons such as the risk of giving the consulted party an unfair economic advantage. So, if a draft bill is intended to be used in consultation before it is tabled in Parliament, the MC should state that intention and ask for the Cabinet's agreement. In the case of a draft bill involving changes to the machinery of government, the approval to consult should generally be sought in a letter to the Prime Minister from the sponsoring Minister.

Drafting instructions should be annexed to the MC. However, they should not be in the form of a draft bill. Their purpose is to facilitate a policy discussion of a legislative proposal and to provide a framework for drafting a bill. Except in very rare instances, drafting instructions in the form of proposed draft legislation are not helpful. Substantial time may be required to assemble the relevant material required as part of drafting instructions. The policy discussion at this stage will make it possible to develop reasonable estimates of the time likely to be required for drafting the legislation. These estimates are essential to planning and managing the Government's legislative agenda.

Drafting Bills

It is essential that both the Legislation and House Planning/Counsel Secretariat and the Secretariat to the appropriate policy committee of Cabinet be informed by the sponsoring department as to any significant departures from the approach to the bill agreed to by Cabinet.

As stated above, both language versions of legislation are equally authentic and must respect the bijural nature of Canada's legal system. Draft legislation must be prepared in both official languages and sponsoring departments must ensure that they have the capability:

- to instruct in both languages;
- to respond to technical questioning from drafting officers in either language and relating to each legal system; and
- to critically evaluate drafts in both languages.

It is not sufficient for a drafting officer and the instructing officer to reach full agreement on the technical adequacy of one language version of a draft bill. Both versions must meet the same standard of technical adequacy in the eyes of those qualified to critically evaluate them and the legislation must be capable of operating in both legal systems. This requirement can be particularly onerous when a legislative proposal is based on a precedent from another jurisdiction where legislation and related information, often of a very technical nature, is available in one language only. In such circumstances, it may be necessary to build into the planning and drafting process a significant time factor to allow for the development, testing, and finalization of appropriate terminology for both versions.

Another important consideration relates to the drafting of preambles and purpose clauses. Preambles can often provide important background information needed for a clear understanding of the bill or explain matters that support its constitutionality. However, when a bill amends existing legislation, the preamble is normally excluded from consolidated versions of the legislation. In order to ensure public awareness of, and access to, background information for an amending bill, a purpose clause may be considered as an alternative because it can be integrated into the consolidated legislation. Both preambles and purpose clauses must be carefully reviewed by the Department of Justice for appropriate language and content.

Review of Bills by the Leader of the Government in the House of Commons

Once a bill has been drafted and approved by the responsible Minister, the Legislation Section of the Department of Justice will arrange for its printing and for copies to be sent to the Legislation and House Planning/Counsel Secretariat (L&HP/C) of the Privy Council Office before the bill is reviewed by the Leader of the Government in the House of Commons.

At this stage the sponsoring department

- prepares material for use in explaining the bill to parliamentarians and members of the public or for distribution;
- prepares a draft statement to be used by the Minister when the bill is referred to Committee;
- submits a revised and updated communication plan if the original attached to the MC is no longer appropriate.

The Leader of the Government in the House of Commons reviews the bill and its consistency with relevant Cabinet decisions. The Leader reports to Cabinet on this review and seeks delegated authority to arrange for introduction of the bill in either the House of Commons or the Senate.

Following Cabinet approval, L&HP/C submits the bill in its final form to the Prime Minister or the Leader of the Government in the House of Commons for signature, together with the royal recommendation in the case of bills that require expenditure. The preparation of royal recommendations is the responsibility of L&HP/C.

5. Parliamentary Processes and Amendments

Introduction and Readings

Government bills are usually introduced by the sponsoring Minister. They proceed through three readings in both the Senate and the House of Commons and are studied by committees of each House. Detailed information on these proceedings can be found by consulting publications such as the *Précis of Procedure*, published by the House of Commons, and *The Senate Today* and *Rules of the Senate of Canada*, published by the Senate.

The timing and place of introduction are decided either by the Cabinet on the recommendation of the Leader of the Government in the House of Commons or by the Leader of the Government in the House of Commons under authority delegated by Cabinet.

Notice of introduction in the House of Commons is given to the Clerk of that House by the Assistant Secretary to the Cabinet (Legislation and House Planning/Counsel) only when instructed to do so by the Leader of the Government in the House of Commons. When introduction is in the Senate, the timing of introduction is decided by the Leader of the Government in the House of Commons in consultation with the Leader of the Government in the Senate. In both cases, the Assistant Secretary informs the sponsoring Minister of the timing of introduction.

Timing of the Second Reading debate, Report Stage, and Third Reading in the House of Commons is the responsibility of the Leader of the Government in the House of Commons. The timing of the stages of debate in the Senate is the responsibility of the Leader of the Government in the Senate.

During a committee's consideration of a bill, whether in the House of Commons or the Senate, the sponsoring Minister or the Parliamentary Secretary attends the committee meetings to assist the deliberations by ensuring that the Government's position is expressed. This is of particular importance in situations where amendments to the bill may be proposed.

Amendments

If the sponsoring Minister wishes to move or accept an amendment after introducing a bill, the following procedure should be followed before the amendment is moved:

- amendments that are merely technical may be agreed to by the sponsoring Minister with no need for Cabinet approval;
- amendments that have an impact on the policy approved by Cabinet or that raise policy considerations not previously considered by Cabinet are subject to the same procedure as the initial proposal, namely, the submission of an MC for consideration by the original policy committee of Cabinet and approval by the Cabinet;
- urgent major amendments need not follow the full procedure referred to above, but may be approved by the Prime Minister and the Chair of the relevant policy committee of Cabinet together with other interested Ministers.

All amendments moved or accepted by the Government must be drafted or reviewed by the Legislation Section of the Department of Justice.

Royal Assent

The final stage in the enactment of a bill by Parliament is Royal Assent. The timing of Royal Assent ceremonies is arranged by the Leader of the Government in the House of Commons in consultation with the Leader of the Government in the Senate.

6. Coming into Force

An Act has the force of law upon Royal Assent, unless it provides otherwise. Quite frequently, an Act provides that it, or any of its provisions, comes into force on a day or days to be fixed by order of the Governor in Council. These orders are prepared by officials in the department that administers the Act and are submitted to the Special Committee of Council by the responsible Minister. If approved, they are sent to the Governor General for signature and published in the *Canada Gazette*. Draft orders should be submitted for approval well in advance of the day or days that they propose for provisions to come into force.

7. Regulation-making

The main elements of the regulation-making process are established by the *Statutory Instruments Act*. They include requirements that:

- draft regulations be examined by the Clerk of the Privy Council in consultation with the Deputy Minister of Justice;
- regulations be transmitted to the Clerk of the Privy Council to be registered and published in the *Canada Gazette*;
- regulations be referred to the Standing Joint Committee of the Senate and the House of Commons for the Scrutiny of Regulations.

These elements are supplemented by the analytical and procedural requirements of the *Regulatory Policy* http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&Page=Publications

8. Conclusion

This Directive sets out the objectives and expectations of the Cabinet in relation to law-making activities of the Government. Departmental officials involved in these activities are expected to be aware of the Directive and to follow the instructions it contains. They are also expected to use the supplementary documents that the Clerk of the Privy Council may issue to provide detailed guidance on planning and managing the development of legislation to ensure that the Cabinet's objectives and expectations are met.

Part 1
Law-making Framework

Chapter 1.1

Choosing the Right Tools to Accomplish Policy Objectives

Overview

This chapter supplements section 2 of the *Cabinet Directive on Law-making* which says:

> Law should be used only when it is the most appropriate. When a legislative proposal is made to the Cabinet, it is up to the sponsoring Minister to show that this principle has been met, and there are no other ways to achieve the policy objectives effectively.

This chapter provides guidance on meeting this requirement by providing an analytical framework that covers:

- the range of instruments (techniques) available for accomplishing policy objectives;
- how to determine which ones are the most appropriate; and
- how to decide whether an Act or regulation is required.

Officials are encouraged to adopt a comprehensive approach to developing proposals to accomplish policy objectives. They should focus on achieving a desired outcome, rather than assuming that a particular instrument, particularly an Act or regulation, will be effective. This chapter is also a good place to begin thinking about what should go into an Act or regulation if one is required. This question is explored in more detail in the "Checklist for Preparing Bill-drafting Instructions for a Memorandum to Cabinet" in Chapter 2.2.

Audience

Departmental program officials and their legal advisers.

Key messages

- Instrument-choice should be considered early in the policy development process.
- The Government cannot deal with every situation. Its involvement must be assessed in light of its responsibilities, its resources and the likely effectiveness of its involvement relative to the involvement of other governments or the private sector.
- The range of possible instruments available to accomplish policy objectives is very broad, allowing the Government to choose the type and degree of its intervention, if any.

- An Act or regulation should only be chosen after assessing the full range of possible instruments.
- Instrument-choice has wide-ranging effects and is an important element of many governmental activities.
- Consultation on instrument-choice, both within and outside the Government, is essential to making good choices.

Introduction

When a situation may require the Government's attention, it should be assessed to determine what, if anything, the Government should do to address it. This involves determining the objectives in addressing it and how these objectives can best be accomplished. This determination should be done as early as possible in the policy development process. The following questions may help you to do this:

- What is the situation?
- What are the objectives in addressing the situation and what particular results are desired?
- Is there a role for the Government of Canada?
- What instruments are available to accomplish the desired results?
- What is involved in putting the instruments in place?
- What effect would the instruments have?
- How will their success be measured?
- Which (if any) instrument(s) should be chosen?

The assessment process does not necessarily follow the order of these questions. Answers reached at one point in the process may have to be re-evaluated in light of other answers.

In order to obtain sound answers, it is also important to conduct appropriate consultations with those affected.

What is the situation?

This step involves defining the key features of a situation that may require the Government's attention. A situation may present itself in the form of a problem, in which case you should try to get to its source and not define it in terms of its symptoms.

The situation may also be an opportunity for the Government to do something creative or positive, for example celebrating a national or global event, as opposed to responding to a problem.

A description of the situation is often framed in terms of how people are behaving or how they may behave in future. Their behaviour may be active (doing something) or passive (not doing something). A behavioural approach involves identifying the following elements:

- the behaviour that is, or may be, creating or contributing to the situation;
- who is engaging in the behaviour;

- who is affected by the behaviour and what these effects are;
- whether some behaviour, or behaviour by some persons, is more serious than others;
- what external factors are influencing the behaviour;
- what behavioural changes are desired to address the situation.

What are the objectives and desired results?

This question is intended to help you define the objectives as concretely as possible in terms of particular results to be achieved. Objectives and the desired results go hand in hand, but they are not quite the same.

For example, an objective might be to make a particular activity safer, while the desired result might be a 30 percent reduction in the rate of injury.

Another example is an objective of increasing Canada's capacity in information technology. The desired result would be to increase the number of people who immigrate to Canada with expertise in this field by 500 in the next two years.

Is there a role for the Government of Canada?

Consider whether the Government of Canada can or should do something. The Constitution constrains the authority of the Government through:

- the distribution of legislative powers between Parliament and the provincial legislatures (although this distribution is qualified by powers such as the spending power and the power to declare works for the general advantage of Canada);
- limits on the exercise of legislative powers, for example the *Canadian Charter of Rights and Freedoms*;
- obligations relating to such things as the provision of services in both official languages.

Policy considerations should also be weighed, including consistency with the political platform of the Government and its approach to federal-provincial relations.

Practical considerations should be addressed as well. The Government has limited resources and it can't deal with every situation: perhaps others are better placed to achieve a desired outcome.

Finally, if the Government does become involved, what role should it play? Possible roles include taking the lead, acting in partnership with others or stimulating or facilitating action.

What instruments are available to accomplish the desired results?

This question looks at the full range of available policy instruments, which can be grouped into five categories:

- *information;*
- *capacity building;*
- *economic instruments, including taxes, fees and public expenditure;*
- *rules;*
- *organizational structure.*

Information

Information can be a powerful tool. People act on the basis of the information available to them. By giving them specific information, it may be possible to influence their behaviour. Some examples are:

- consumer information about the quality or safety of products;
- occupational health and safety information;
- anti-drinking and driving advertising and education campaigns;
- "buy-Canadian" promotional campaigns;
- environmental awareness programs;
- information about how programs are operated or about administrative practices;
- symbolic gestures.

Capacity Building

Capacity-building increases the ability of people or organizations to do things that advance policy objectives. It goes beyond providing information to include transferring to them the means for developing their ability. Some examples are:

- employment skills training programs;
- programs to support scientific research and public education about the results of the research;
- information gathering through consultation or monitoring;
- working with industries to help them develop voluntary codes governing their practices.

Economic Instruments

Many instruments have a mainly economic focus. They affect how people behave in the marketplace or in other economic transactions.

These instruments include taxes, fees and public expenditure, which are considered separately below. They also include the creation of exclusive or limited rights, such as marketable permits, licences or marketing quotas that acquire value because they can be bought and sold. Insurance requirements are another example of economic instruments because they can, for example, force businesses to assess and reduce risks and ensure that their products are priced to cover the costs of insurance or preventive measures.

Taxes and Fees

The basic purpose of taxes and fees is to raise revenue. However, they are also capable of influencing how people make choices about the activities to which the taxes or fees apply. In this sense, they can be powerful tools for accomplishing policy objectives. Examples include:

- taxes on income, property or sales;
- customs duties;
- fees or charges for licences or services;
- tax exemptions, reductions, credits or remissions.

Further information on user fees and charges is available from the Treasury Board Secretariat:

- Cost Recovery and Charging Policy available at http://www.tbs-sct.gc.ca/Pubs_pol/opepubs/TB_H/CRP_e.html.
- Information on External User Charges at http://www.tbs-sct.gc.ca/Pubs_pol/opepubs/TB_H/FeeInfoe.html

Public Expenditure

The Government can act by transferring or spending money in a particular area in order to accomplish policy objectives involving those who receive the money. This makes it a potentially effective instrument for encouraging particular activities that support the policy objectives. Some examples of public expenditure are:

- monetary benefits, grants or subsidies;
- loans or loan guarantees;
- vouchers redeemable for goods or services;
- transfers to the provinces and territories for education or health programs.

Rules

Rules, in the broadest sense, guide behaviour by telling people how things are to be done. However, there are many different types of rules. For example, they differ in terms of how they influence behaviour:

- Acts, regulations or directives tend to apply to groups of people and have legal force in that they can be enforced by the courts;
- contracts or agreements also have legal force, but they generally apply only to those who are parties to them;
- guidelines, voluntary codes or standards and self-imposed rules usually apply to groups of people, but they do not have legal force, relying instead on their persuasive or moral value.

Rules having legal force are generally cast in terms of requirements, prohibitions or rights. A combination of these elements can be seen in rules that create:

- rights that entitle people to do things on an equal footing, such as obtaining goods, services or employment, and corresponding requirements to provide these things to those entitled to them;
- prohibitions against doing something without a licence that confers a right to do it, for example, exclusive or limited rights, such as marketable permits, licences or marketing quotas that acquire value because they can be bought and sold.

Rules may also be formulated in different levels of detail, for example:

- as precise requirements that tell people exactly what to do; or
- as performance standards that set objectives that people are responsible for meeting.

Finally, it is worth noting the drafting technique of incorporation by reference. Rules of one type (for example, Acts or regulations) can sometimes be drafted so that they incorporate rules of the same or another type (for example, other Acts or regulations as well as industry codes or standards) simply by referring to them, rather than restating them. This avoids duplication of the incorporated rules and can be a way of harmonizing the laws of several jurisdictions if they each incorporate the same set of rules. However, this technique, particularly in the context of regulations, is subject to a number of legal considerations, such as requirements governing the publication of laws in both official languages and the general accessibility of the law.

Additional information on choosing the right type of rules can be found in the publications listed at the end of this chapter as well as in the "Checklist for Preparing Bill-drafting Instructions for a Memorandum to Cabinet" in Chapter 2.2.

Organizational Structure

Organizational structure is often critical in accomplishing policy objectives. It generally supports the use of other instruments by providing for their administration. Examples of organizational instruments include:

- departmental or agency structures to deliver programs;
- framework agreements and partnerships with other governments or organizations;
- privatization or commercialization of government services;
- public investment in private enterprises.

Additional information on organizational structure can be found in the Alternative Program Delivery Policies and Publications, available from the Treasury Board Secretariat at http://www.tbs-sct.gc.ca/Pubs_pol/opepubs/TB_B4/siglist_e.html or through the Alternative Service Delivery Division Home Page at http://www.tbs-sct.gc.ca/si-si/asd-dmps/index_e.htm.

Combination and Timing of Instruments

These instruments are not necessarily stand-alone alternatives to one another. In fact, many of them are mutually supportive or otherwise interrelated. For example, information enables organizations to work effectively and organizations are often needed to administer legal rules, such as Acts or regulations, which may, in turn, be needed to support the creation of organizations.

Another important dimension of the range of available instruments is timing. Some instruments are better used in the initial stages of policy implementation while others may only be needed later if circumstances warrant. For example, information campaigns often precede the imposition of legal rules and, if they are effective enough, they may avoid the need for such rules.

What is involved in putting the instruments in place?

This question involves the legal, procedural and organizational implications of using each instrument as well as the process requirements for making them operational. It also involves considering in greater detail the role that the Government of Canada may play, whether acting alone or as a partner with other levels of government or the private sector.

You should assess:

- whether the use of the instrument is within the general mandate or authority of the Government;
- whether some specific legal authority is needed, for example, authority to impose taxes or penal sanctions, and, if so,
  - whether it requires new laws (Acts or regulations) to be made,
  - whether there is legal authority to make the new laws federally, and
  - whether the new laws would be consistent with Canada's international obligations.

  It is particularly important to consult departmental legal advisers when considering this legal aspect of the question.
- What the short- and long-term operational requirements, both organizational and financial, of the instruments are, including:
  - organizations and personnel needed to administer the instruments, for example, officials needed to assess benefit claims or conduct inspections,
  - additional costs for the courts because their workload has increased as well as the effect such an increase may have on their general efficiency;
- who should be consulted before the instruments are put in place (other departments, other governments, stakeholders);
- what processes are required to put the instruments in place, including processes required for any new laws (as described in this Guide);
- what, if any, monitoring or enforcement measures will be needed, such as penalties, inspections and court action (this is closely connected to the next question of what effect the instruments would have).

What effect would the instruments have?

This question involves assessing how the instruments would work, including:

- whether the instruments will bring about the desired results, including whether people will voluntarily do what the instruments encourage or require, or whether some are likely to try to avoid compliance or find loopholes;
- whether the instruments will cause any unintended results or impose costs or additional constraints on those affected by them;

- what the scope and nature of any likely environmental effects will be, particularly any adverse environmental effects and how they can be reduced or eliminated;
- what effect the instruments may have on federal-provincial relations or international relations, particularly in light of the Government's obligations under interprovincial or international agreements;
- how the general public will react to the instruments and, in particular, whether the instruments will be perceived as being enough to deal with the situation.

When deciding whether to choose legal rules, you should also keep in mind their strengths and weaknesses. They can often be used to overcome resistance in achieving the desired results because they are binding and enforceable in the courts. However, they may also give rise to confrontational, rights-based attitudes or stifle innovative approaches to accomplishing the policy objectives. You should also not assume that a legal prohibition or requirement will, by itself, stop people from doing something or make them do it.

How will the success of the instruments be measured?

It is not enough to choose various instruments and use them. Clear and measurable objectives must also be established as well as a means for monitoring and assessing whether they are being achieved. This assessment should be ongoing and include looking at how other governments are addressing the same situation. This is necessary both for determining whether the chosen instruments should continue to be used as well as for providing a better basis on which to make instrument-choice decisions in future.

Which instruments should be chosen?

The final step is to choose the instruments that would be most effective in achieving the policy objective. It is important to realize that a single instrument is seldom enough. Usually a combination of instruments is required, often in stages with different combinations at each stage. They should be chosen through a comparative analysis of their costs and benefits, taking into account the answers to the preceding questions.

This is also a good time to consider again whether there is a role for the Government of Canada. It may be that none of the instruments should be chosen if:

- the situation does not justify the Government's attention, for example, because there is no problem or the situation is beyond the Government's jurisdiction or is not a priority for it;

- the situation will take care of itself or will be addressed by others;
- the Government does not have the resources to address the situation;
- the Government becoming involved in the situation would lead to unmanageable demands to become involved in similar situations.

Additional information

Additional information on how to implement policy objectives can be found in the following publications and through Web sites:

- Alternative Program Delivery Policies and Publications, Treasury Board Secretariat: http://www.tbs-sct.gc.ca/Pubs_pol/opepubs/TB_B4/siglist_e.html
- Alternative Service Delivery Division Home Page, Treasury Board Secretariat: http://www.tbs-sct.gc.ca/si-si/asd-dmps/index_e.htm
- *Assessing Regulatory Alternatives*, Regulatory Affairs and Orders in Council Secretariat of the Privy Council Office: http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&Page=Publications
- Cost Recovery and Charging Policy, Treasury Board Secretariat: http://www.tbs-sct.gc.ca/Pubs_pol/opepubs/TB_H/CRP_e.html
- *Designing Regulatory Laws that Work*, Constitutional and Administrative Law Section of the Department of Justice
- *1999 Cabinet Directive on Environmental Assessment of Policy, Plan and Program Proposals*, Canadian Environmental Assessment Agency: http://www.ceaa-acee.gc.ca/0012/0006/sea_e.htm
- Information on External User Charges, Treasury Board Secretariat: http://www.tbs-sct.gc.ca/Pubs_pol/opepubs/TB_H/FeeInfoe.html
- *Standards Systems: A Guide for Canadian Regulators*, Regulatory Affairs and Standards Policy Directorate of Industry Canada: http://strategis.ic.gc.ca/stdsguide
- *Voluntary Codes: A Guide for Their Development and Use*, Regulatory Affairs and Standards Policy Directorate of Industry Canada: http://strategis.ic.gc.ca/volcodes

Chapter 1.2
Legal Considerations

Overview

This chapter supplements section 2 of the *Cabinet Directive on Law-making.*

Federal Acts and regulations, and indeed federal law generally, form a single system. If a legislative proposal is to be implemented effectively, it must be expressed in legislation that takes the federal legal system into account and fits into it. A good understanding of this system is essential. This Chapter provides an introduction to its major elements, which consist of 4 groups of laws:

- the Constitution
- quasi-constitutional Acts
- Acts of general application
- rules of law that are of general application.

The significance of these laws varies. The Constitution is the most fundamental law. If another law is inconsistent with the Constitution, it has no force. The second group of laws are called quasi-constitutional because they too express fundamental values and they generally override other inconsistent laws. However, they are not subject to the rules for amending the Constitution since they can be amended by another Act of Parliament. The third and fourth groups include Acts and other rules of law that generally apply, unless another Act clearly says otherwise.

In this chapter

- The Constitution
- Quasi-constitutional Acts
- Acts of General Application
- Rules of law that are of General Application

Audience

All Government officials involved in the law-making process and other interested persons.

Key Messages

Officials involved in law-making activities must understand the legal framework for legislation and other government action.

The Constitution

Canada is governed by a Constitution that rests on British constitutional tradition and includes numerous Acts and orders in council. The *Constitution Act, 1867* and the *Canadian Charter of Rights and Freedoms* are among the most important of these.

The *Constitution Act, 1867* allows us to answer the question: "What can an Act deal with?" It establishes two levels of government in Canada: federal and provincial. Each exercises full legislative power over the matters within its jurisdiction. Constitutional law, as elaborated by court decisions, defines what these matters are, as well as their limits.

The Constitution also provides a number of rules that define the legal framework for making laws, for example, rules requiring the bilingual publication of Acts or governing the procedures of Parliament and the provincial legislative assemblies.

The *Canadian Charter of Rights and Freedoms* allows us to answer the question: "How can an Act deal with its subject matter?" It governs how legislative objectives may be achieved, rather than the matters that may be dealt with. The Charter imposes limits on government activity in relation to fundamental rights and liberties.

Because the Charter is part of the Constitution, Acts and regulations are ineffective to the extent that they are inconsistent with the Charter. It is legally possible for Parliament to override explicitly certain of the rights and freedoms guaranteed by the Charter. However, Parliament has never exercised this power and a government would obviously be extremely reluctant to propose a bill that would have that effect.

Another important part of the Constitution is Part II of the *Constitution Act, 1982.* It recognizes and affirms the existing aboriginal and treaty rights of the Aboriginal peoples of Canada.

The Minister of Justice is responsible under the *Department of Justice Act* for seeing that the administration of public affairs is in accordance with law. This responsibility includes ensuring that all government actions are consistent with the Constitution. Two specific mechanisms are in place for this purpose:

- the Cabinet Support System (See "Constitutional Issues and the Cabinet Support System" in Chapter 2.2)
- the certification of Government bills. (See "Certification of Government Bills" in Chapter 2.4)

It is also important to keep in mind that since the *Quebec Act* of 1774 Canada has had two systems of law: common law and civil law. The application of an Act may differ depending on whether it is being applied in a part of Canada that is governed by one system or the other. The common law applies throughout Canada in matters of government law. However, private legal relationships are governed by civil law in Quebec and by common law elsewhere. This has a number of effects, particularly on the sources of law and the interpretation of an Act.

Quasi-constitutional Acts

Besides the *Canadian Charter of Rights and Freedoms*, there are a number of "quasi-constitutional" Acts that can limit policy choices in the preparation of Acts and regulations. These Acts express values that are of fundamental importance in Canada including, in particular, the protection of minorities. Any derogation from them must be explicit.

Accordingly, these Acts apply except to the extent that other Acts expressly exclude their operation. It is legally possible to override them, but this is very rarely done and those involved in the preparation of Acts and regulations should assume that the quasi-constitutional Acts will apply.

The requirement of explicit derogation protects the values expressed in those Acts to the maximum extent possible, short of entrenching those values in the Constitution. It also ensures accountability to the public for any decision to derogate.

The most important quasi-constitutional Acts are:

- *Canadian Bill of Rights*
- *Canadian Human Rights Act*
- *Official Languages Act*

Canadian Bill of Rights

The first of these quasi-constitutional Acts to be enacted was the *Canadian Bill of Rights*. It is a precursor of the Charter, recognizing and declaring a series of human rights and fundamental freedoms. The Minister of Justice's responsibilities in relation to the Bill are similar to those described above in relation to the Charter.

The *Canadian Bill of Rights* provides that every law of Canada is to be interpreted so as not to infringe the recognized rights or freedoms, unless it expressly says otherwise. The only explicit derogation from the *Canadian Bill of Rights* took place during the October Crisis. It was included in the *Public Order (Temporary Measures) Act*, 1970, which replaced the regulations made in 1970 under the *War Measures Act*.

Canadian Human Rights Act

The *Canadian Human Rights Act* is an important aspect of our national human rights protection. Human rights legislation sets out many of the fundamental values of our society. The Act itself prohibits discrimination in employment, services, contracts and accommodation.

In contrast to the *Canadian Charter of Rights and Freedoms*, which protects individuals primarily against acts committed by governments, human rights legislation protects against discriminatory acts committed by the federal government, businesses and individuals in areas of federal jurisdiction. The Act applies to such areas as telecommunications, banking and interprovincial transportation and was designed to provide an informal, expeditious and inexpensive mechanism for the resolution of human rights complaints.

The courts have recognized that Acts dealing with human rights prevail over other legislation. The *Canadian Human Rights Act* therefore prevails over other federal Acts.

Official Languages Act

The purpose of the *Official Languages Act* is to ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all federal institutions. It particularly applies with respect to the use of the official languages in parliamentary proceedings, in legislative and other instruments, in the administration of justice, in communicating with or providing services to the public and in carrying out the work of federal institutions. This Act also supports the development of English and French linguistic minority communities and generally advances the equality of status and use of the English and French languages within Canadian society.

Section 82 of the *Official Languages Act* says that Parts I to V prevail over all other Acts, except the *Canadian Human Rights Act*.

Acts of general application

Besides the Constitution and quasi-constitutional Acts, a number of other Acts can limit policy choices in the preparation of bills. These other laws apply except when some other law excludes their operation. They differ from quasi-constitutional Acts in that they do not express values that are as fundamental and so it may be easier to exclude them. These Acts affect the preparation of bills in two ways.

First, because courts presume that they apply except when some other Act says otherwise, provisions excluding their operation must be drafted explicitly.

Secondly, drafters presume that there has been no political decision to exclude one of these Acts if no such decision is mentioned in the Cabinet Record of Decision. Instructing officers who wish to override this presumption bear the burden of persuading their minister that a recommendation to that effect should be included in the ministerial recommendations section of the Memorandum to Cabinet (MC). Ministers who are persuaded to do so will have to justify their decision to Parliament and the public.

Like the Constitution and the quasi-constitutional Acts, these presumptively applicable Acts support values found in Canadian society. Policy makers can rely on the solutions that these Acts provide instead of having to develop their own solutions. Departmental legal advisers and drafters in the Legislation Section of the Department of Justice can provide assistance in this regard.

The requirement to explicitly exclude these Acts in other Acts or regulations and in Cabinet Records of Decision:

- protects those values;
- ensures that ministers and, ultimately, parliamentarians decide whether other values are more important in the circumstances under consideration; and
- helps to ensure that public servants do not inadvertently create political controversy.

Those involved in the preparation of bills will take into account the requirement of explicitness so as to ensure that any political decision to exclude the operation of a presumptively applicable law is legally effective.

Finally, it is often undesirable in Acts and regulations to provide specifically for the application of a rule that already applies generally. Such a provision may cast doubt on the application of the rule in other Acts or regulations. Alternatively, it may tempt the courts and others to assign some other unintended meaning to the particular provision, since the courts assume that every provision has some legal effect and is intended to do something rather than nothing.

The most important Acts of general application are:

- *Access to Information Act*
- *Criminal Code*
- *Financial Administration Act*
- *Interpretation Act*
- *Privacy Act*
- *Statutory Instruments Act.*

Access to Information Act

The *Access to Information Act* provides a right of access to information in records under the control of federal government institutions. The right is provided "notwithstanding any other Act", but it is subject to certain exemptions, including those for:

- information obtained in confidence from another government;
- personal information;
- trade secrets and other confidential information supplied by a third party; and
- information whose disclosure is restricted by certain Acts of Parliament, such as the *Income Tax Act.*

Refusals of access may be reviewed by the Information Commissioner, who can make recommendations to a head of a federal government institution and report to Parliament. Also, the Information Commissioner or a person who requests access to information can apply to the Federal Court for a review of the matter.

The *Access to Information Act* provides specific solutions to problems of reconciling a right of access to government information with the need to keep some information confidential or secret.

Unjustified proposals to circumvent the Act can not only cause difficulty for sponsoring departments in having Acts enacted by Parliament, but can also lead to anomalies in the law and the eventual ineffectiveness of the *Access to Information Act.* Any proposal to exempt information from the operation of that Act should be brought to the attention of the Information Law and Privacy Section of the Department of Justice.

Criminal Code

The *Criminal Code* not only creates criminal offences, it also deals with the investigation and prosecution of offences. For example, it authorizes the issuance of search warrants and states the rules of procedure for laying charges and conducting trials. In addition, Part I of the Code states many fundamental rules of criminal law dealing with such things as the presumption of innocence (section 6), excuses, justifications and defences to charges (section 8) and liability for attempting to commit an offence or participating in its commission. Part XXIII sets out principles and procedures governing the imposition of sentences for offences.

Subsection 34(2) of the *Interpretation Act* provides that the Code applies to all offences created by a federal Act or regulation (unless it otherwise provides).

The following are examples of provisions in the Code whose duplication in particular cases may turn out to have unintended consequences:

- rules that extend liability for the commission of offences to persons who attempt to commit them or participate in their commission;
- the power to obtain a search warrant from a justice of the peace where there are reasonable grounds to believe that an offence has been committed; and
- the power to obtain a "telewarrant" from a justice of the peace where it is not practical to appear personally before the justice.

Financial Administration Act

The *Financial Administration Act* provides the legal basis for the Government's financial management accountability. For this purpose, it contains:

- provisions governing public money, including public spending and keeping the accounts of the Consolidated Revenue Fund;
- the legal framework for the maintenance and control of public property by public servants;
- the legal framework for managing the public debt;
- general provisions that apply to Crown corporations.

The Act also establishes two departments: the Department of Finance and the Treasury Board. The Treasury Board is given wide powers to administer the federal public service, including powers relating to the management of human resources.

Because this Act is a basic law that supplements other laws, those involved in legislative projects should understand it well in order to avoid needlessly duplicating its provisions. For example, new legislation should not duplicate the provisions of the Act that authorize fees to be prescribed for government services or facilities (section 19ff.). Similarly, provisions for the payment of interest on debts to the Government need not be included because they are also covered (section 155.1).

Interpretation Act

Interpretation Acts were originally enacted to avoid the repetition of rules that are commonly included in individual Acts. Rather than repeat the rules each time a new Act is drafted, they were collected into a single Act that says they apply generally, except when another Act or regulation provides that the rule does not apply.

The rules contained in the *Interpretation Act* cover;

- how legislation operates in terms of when it comes into force (section 6) and where it applies (section 8);
- definitions of commonly used terms such as "corporation" or "year" (sections 35 to 37);
- other interpretational rules, for example, that references to nouns in the singular include the plural (subsection 33(2)) and transitional rules that apply when legislation is amended or repealed (sections 42 to 45));
- administrative rules, for example, about the issuance of proclamations (section 18), the administration of oaths (section 19), appointments (section 23), and the exercise of powers, including the delegation of powers (section 24).

The following are examples of *Interpretation Act* rules whose duplication in particular cases may turn out to have unintended consequences:

- the power of departmental officials to exercise, on behalf of the minister presiding over that department, powers conferred by law on that minister;
- the power of regulation-making authorities to amend or repeal regulations;
- the power of appointing authorities to terminate appointments and to remove, suspend, re-appoint and reinstate public officers; and
- the survival of rights that vested under an earlier Act or regulation and other rules respecting the temporal operation of Acts and regulations.

Privacy Act

The *Privacy Act* protects the privacy of individuals with respect to personal information about themselves held by federal government institutions, and provides individuals with a right of access to that information. Refusals of access may be reviewed by the Privacy Commissioner, who can make recommendations to a head of a federal government institution and report to Parliament. Also, the Privacy Commissioner or a person who requests access to information can apply to the Federal Court for a review of the matter.

Unjustified proposals to circumvent the Privacy Act present the same concerns as proposals to circumvent the *Access to Information Act* and should be brought to the attention of the Information and Privacy Law Section of the Department of Justice.

Statutory Instruments Act

The *Statutory Instruments Act* provides for the examination, registration, publication and parliamentary scrutiny of regulations. A fundamental principle of Canadian law is that everyone is presumed to know the law. This principle cannot be accepted or be effective unless it is supported by a system that enables those affected by a law to have reasonable access to it. The *Statutory Instruments Act* provides a means of making regulations public by requiring them to be registered with the Clerk of the Privy Council and published in the *Canada Gazette* Part II. (See "Making Regulations" in part 3).

Bills containing powers that are to have effect as law are usually drafted so that the exercise of those powers will result in a "regulation" for the purposes of *the Statutory Instruments Act.*

The publication requirements of the *Statutory Instruments Act* are not always appropriate. However, drafters will take issue with proposals to get around the Act if there is clearly no effective system in place under a law to make it known in both official languages to those affected by it. The justification for any derogation from the Act must therefore provide alternative solutions to the problems that the Act resolves. For example, the MC should explain what steps will be taken to:

- publicize a document that is to have effect as law if it will not be registered or published under the Act;
- ensure that the document is legally effective;
- make the document available to Parliament.

Legal principles of general application

In addition to rules stated in Acts of general application, there are also a number of important principles that form part of the legal system. They operate in much the same way and must also be taken into account in developing legislative proposals. The following are examples of these principles:

- the rules of natural justice and procedural fairness, which require that a person whose rights or interests are affected by an administrative decision be given a reasonable notice of the proposed decision and an opportunity to be heard by an unbiased decision maker;
- respect for the ordinary jurisdiction of the courts, including the jurisdiction of the Federal Court of Canada under the *Federal Court Act* to hear and determine an application for judicial review in which relief is sought against a federal board, commission or other tribunal;
- the prospective operation of Acts of Parliament and regulations, which limits retroactive interference with rights;
- the principle that Acts of Parliament and regulations generally have effect throughout Canada, including the internal waters and the territorial sea, but not outside Canada;
- respect for and compliance with Canada's treaty obligations and Canada's other obligations under international law;
- the principle that property should not be expropriated without compensation;
- the requirement that one must have a guilty mind in order to be guilty of an offence; and
- the need to be very clear when providing that a person is to be penalized for contravening an Act or regulation since the courts give them the benefit of the doubt when penal provisions are ambiguous.

Despite the applicability of a general principle, it is sometimes not good legislative policy to silently rely on it. For example, the requirement of notice is an important element of the rules of natural justice. If the Act is silent, the courts may have to determine which persons have a sufficient interest in a proposed decision to be entitled to notice of it and how much notice those persons are entitled to. It is often preferable for an Act to answer these questions specifically.

Another example relates to the requirement that one must have a guilty mind in order to be guilty of an offence. The law distinguishes between true crimes, where the required mental element of the offence is knowledge or intention, and strict liability offences, where the offence has no mental element as such, although there is a defence of due diligence. (A third class of "absolute liability" offences, where there is no defence of due diligence, is not relevant here.)

If the Act is silent, the courts may have to determine whether an offence is a true crime or a strict liability offence. It is sometimes preferable for an Act to answer this question, especially where the same Act contains both true crimes and strict liability offences. A common instance of this occurs when a regulatory Act contains mainly strict liability offences but also offences of obstructing enforcement officers and providing false or misleading information. These offences should be specified as true crimes through the use of words such as "willfully" or "knowingly" because they are akin to *Criminal Code* offences prohibiting similar conduct.

In answering these kinds of questions specifically, policy making is guided and structured, rather than limited, by presumptively applicable principles.

There is a difference between specifying what would otherwise be uncertain and merely duplicating a rule of law that is applicable in any event. If the rule of general application does not need to be expressed, then expressing it is not only useless, but possibly dangerous, because it may cast doubt on the application of the rule in other Acts.

Part 2
Making Acts

Chapter 2.1
Getting Started

Overview

This chapter provides background information to help get started on the law-making process for Acts. It begins by considering what Acts are, including the different kinds of Acts, and who is involved in making them.

The focus then shifts to legislative planning and management, which is addressed in section 2 of *the Cabinet Directive on Law-making*, and the preparation of the Government's legislative program, which is addressed in section 3 of the Directive. It deals with these topics from two perspectives. The first is the Government-wide process that is administered by the Privy Council Office and hinges on the legislative call letter that it sends to the departments. The second is the perspective from within departments that are developing legislative proposals. The objective of this material is to help departments to participate effectively in the Government-wide process and to manage their legislative activities internally.

In this chapter

- What are Acts and Who is involved in Making Them?
- Preparation of the Government's Legislative Program
- Departmental Planning and Management
- Strategic Considerations for Legislative Planning and Management
- Project Planning Templates
- Schematic Map of the Federal Law-making Process and Associated Support Activities (Acts)

Audience

- Managers who are responsible for coordinating law-making projects.
- Officials responsible for advising the Privy Council Office about law-making projects in their departments.

Key Messages

- The legislative call letter is a key planning tool for the Government that requires timely and accurate information about law-making projects.

- Law-making is a complex management exercise that requires careful planning. Approach law-making as a project and follow good project management practices.

What are Acts and Who is Involved in Making Them?

What is an Act?

An Act is the most formal expression of the will of the State. It is a form of written law that is made by Parliament through a process often referred to as *enactment*. Parliament consists of three parts: the Crown, the Senate and the House of Commons. Acts originate as *bills*, which are introduced in either the Senate or the House of Commons. Each of Parliament's three parts must approve a bill before it becomes law. In this Guide, the parliamentary approval process is referred to as *enactment*.

The purposes of an Act may either be of a general, public nature (*public Acts*) or private, conferring powers or special rights or exemptions on particular individuals or groups (*private Acts*). Almost all Government bills result in the enactment of *public Acts*.

Bills are classified either as *Government bills*, which are submitted to Parliament by members of the Cabinet, or *private members' bills*, which are submitted by members of the Senate or the House of Commons who are not in the Cabinet.

The Guide deals exclusively with the enactment of Government bills resulting in public Acts.

New and Amending Acts

A bill may provide for the enactment of a new Act or it may amend (change) one or more existing Acts. If a bill to enact a new Act or amend an existing Act makes it necessary to amend other Acts, the bill will contain "consequential" or "related" amendments to those Acts.

Miscellaneous Statute Law Amendments

The Miscellaneous Statute Law Amendment Program is a periodic legislative exercise to correct anomalies, inconsistencies, outdated terminology or errors that have crept into the statutes. It allows minor amendments of a non-controversial nature to be made to a number of federal statutes without having to wait for particular statutes to be opened up for amendments of a more substantial nature. *Miscellaneous Statute Law Amendment Acts* are subject to an accelerated enactment process involving committee study of legislative proposals before they are introduced as a bill.

The Program was established in 1975 and is administered by the Legislation Section of the Department of Justice.

Anyone may suggest amendments, but most come from Government departments or agencies. To qualify for inclusion in the proposals, an amendment must *not*

- be controversial;
- involve the spending of public funds;
- prejudicially affect the rights of persons; or
- create a new offence or subject a new class of persons to an existing offence.

The Legislation Section is responsible for requesting and reviewing proposals. It then prepares them in the form of a document entitled

> Proposals to correct certain anomalies, inconsistencies and errors in the Statutes of Canada, to deal with other matters of a non-controversial and uncomplicated nature in those Statutes and to repeal certain provisions of those Statutes that have expired, lapsed or otherwise ceased to have effect.

The proposals are tabled in the House of Commons by the Minister of Justice, and are then referred to the Standing Committee on Justice and Human Rights. The proposals are also tabled in the Senate and referred to its Standing Committee on Legal and Constitutional Affairs.

Consideration of the proposals by the Standing Committees has always been thorough and non-partisan. Since these committees are masters of their own procedure, they can always accept or reject requests to withdraw proposals or to add new ones. The latter must, of course, meet the criteria mentioned above. Perhaps the most important feature of the entire program is the fact that if, at either of the committees, a proposal is considered to be controversial, it is dropped.

The Legislation Section then prepares a Miscellaneous Statute Law Amendment Bill based on the reports of the two committees and containing only proposals approved by both of them. The bill is then subject to the ordinary enactment procedures. An example of one of these Acts is the *Miscellaneous Statute Law Amendment Act, 1999*, SC 1999, c. 31, which can be found at: http://www.parl.gc.ca/36/1/parlbus/chambus/house/bills/government/C-84/C-84_4/C-84_cover-E.html.

Who is involved in Making Acts?

Sources of Legislative Proposals

Although the passage of an Act involves decisions of the Government and enactment by Parliament, the policy underlying an Act does not necessarily originate within the Government. There are basically five sources of legislative policy:

- the general public;
- Cabinet ministers;
- the Public Service of Canada;
- Parliamentarians (senators and members of the House of Commons);
- Courts and administrative agencies.

The Speech from the Throne is one of the primary means for the Government to announce its legislative program. It is delivered at the beginning of each session of Parliament by the Queen or, most often, by her representative, the Governor General. The legislative program announced in the Speech from the Throne is often taken from the electoral platform of the governing party, particularly when a new Parliament is formed. However, during the course of the Government's mandate, the legislative program will be taken from the priorities established and approved by the Cabinet. The budget speech each year is another important source of legislative policy.

Acts frequently represent the outcome of important political initiatives or decisions of the Government. They may also result from recommendations in a report of a working group or royal commission of inquiry. Finally, Acts may be intended to implement treaties, conventions or accords; to provide for administrative action, such as licensing; or to deal with particular problems or emergency situations.

Events may affect the Government's legislative program. You should be aware that the Government also publicizes its ideas in the form of position papers and press releases.

Who are the main participants?

Exactly who is involved in making a particular Act depends on a variety of factors, including the type of Act and who sponsors it.

The following are the main participants in the preparation of Government bills:

- the Cabinet;
- the Minister who introduces the bill (the "sponsoring minister");
- officials in the sponsoring Minister's department, including officials responsible for
  - policies and programs,
  - communications,

  - cabinet affairs,
  - parliamentary relations;
- departmental legal advisers;
- the Privy Council Office;
- the Legislative Services Branch of the Department of Justice.

These participants are also involved in the parliamentary phase of the enactment process where the key participants are Senators, members of the House of Commons and parliamentary staff.

Preparation of the Government's Legislative Program

Who prepares the program?

The Leader of the Government in the House of Commons is responsible for the Government's legislative program in the House of Commons. The Special Committee of Council (SCC) is a ministerial forum at the Cabinet committee level for discussing the Government's overall legislative planning and for specific legislative issues requiring decisions by the Cabinet. The Leader of the Government in the House of Commons and Leader of the Government in the Senate are members of this Cabinet committee. The Legislation and House Planning/Counsel Secretariat of the Privy Council Office supports these ministerial and Cabinet committee responsibilities.

Legislative Call Letter

Timing

Following the Speech from the Throne at the opening of each Session of Parliament, the Assistant Secretary to the Cabinet (Legislation and House Planning/Counsel) writes to all Deputy Ministers and some agency heads asking them to submit a list of the legislation their Ministers plan to propose to Cabinet for introduction in the next session. The list is to be submitted within the time specified in this legislative "call letter", usually one month. The letter is subsequently sent twice a year, normally in June and November, in order to deal with changing priorities.

Responses

Each proposal should contain the following information where possible:

- a summary of its principal features;
- whether there is policy approval for the legislation from Cabinet and expenditure approval, where appropriate;
- an assessment of the proposal from a broader, horizontal perspective in terms of both the sponsoring minister's portfolio and other government priorities and initiatives;
- whether it will constitute
  - new legislation,
  - a repeal of existing legislation,

  - a major revision of existing legislation,
  - an amendment to existing legislation that is simple in drafting terms but would be controversial or would effect a major change, or
  - technical and administrative amendments ("housekeeping");
- if new legislation is proposed, why the legislation is necessary;
- its relationship, if any, to the Government's priorities, as enunciated in various policy statements;
- federal-provincial relations implications;
- whether any new Governor in Council positions will be created and their terms and conditions of appointment;
- the scope of the regulatory component of the proposal, if any;
- the target date for passage, together with a tentative assessment of its priority, based on the following categories
  - URGENT (measures subject to statutory time constraints or deadlines announced by the Government),
  - ESSENTIAL,
  - OTHER.

A Minister's legislative list should refer to any existing statutes that require amendments in order to remain current.

Cabinet Review

The proposals are prioritized by the Leader of the Government in the House of Commons. The Special Committee of Council (SCC) reviews a tentative outline of the legislative program for the next sitting, together with the assignment of priorities for the various proposals.

Each week while Parliament is in session, the Leader provides regular updates on the status of the program to the SCC, which reviews the progress of bills through Parliament and the status of bills nearing readiness for introduction. The legislative program is adjusted to accommodate such circumstances as changing priorities or the parliamentary workload.

The Leader normally advises the SCC and the full Cabinet of the updated legislative program twice each year.

Departmental Planning and Management

Each department manages the legislative proposals in its areas of responsibility. It must:

- plan each stage of the law-making process, including such things as consultation and the development of any regulations that may be needed;
- ensure that it has allocated the resources necessary to carry its proposals through each stage;
- ensure that it has the capacity to formulate policy and instruct legislative drafters in both official languages; and
- plan and allocate resources for the implementation of new laws.

Departments must also plan their law-making activities as they relate to particular bills or regulations. These activities are to be managed as projects with tools for determining what resources are needed, what tasks must be performed and what time frames are appropriate.

Project Planning and Management Principles

Principles of project planning and management must be applied to the process for preparing and enacting bills. They bring a discipline that allows for better direction from senior management and more transparency in the process. They also provide a way to achieve the desired outcome in a timely manner. This part of the chapter briefly summarizes the main elements of project planning and management. You should also consult the Treasury Board Project Management Policy, which is available on the Treasury Board Secretariat website at http://www.tbs-sct.gc.ca/Pubs_pol/dcgpubs/TBM_122/CHAPT2-2_e.html.

The Government devotes significant resources to the development of legislation. There is a general consensus that the current practice used in most departments needs to be more efficient and effective. In recent years some federal organizations have experimented successfully by using independent teams—such as task forces and working groups—reporting directly to the executive level as a means of improving the process for developing legislation.

The process is very complex and time consuming. If managed like other operational activities, it competes with the dozens of other operational priorities and urgent matters on the executive agenda. When managed outside routine operations, a legislative project can take on a higher profile at the executive level.

The ways of understanding project management are probably as numerous as the authors who have written about it. However, this section focuses on three main elements: **planning**, **scheduling** and **controlling** the activities needed to reach the project objectives.

Planning

Planning allows those involved or interested in a project to have a common understanding of its objectives and what will be needed to achieve them. As will become clear, it is also a powerful tool for managing the project and its progress.

Establish a project plan

A project plan includes an outline of the scope and objectives of the project as well as a list of what has to be accomplished at each of its main stages.

The scope of a legislative project usually consists of implementing the government policies.

The definition of the objectives is more complex and provides a better understanding of the project. This is because the objectives must be clearly and precisely described and must mirror the needs that the project must meet. They must also be attainable and measurable; otherwise it will be impossible to determine whether they have been achieved.

A useful technique to help understand the policy context is to hold seminars in order to engage in open discussion of the concepts and intent of the proposed legislation. Such discussions enhance the understanding of the policy issues and support team building as well as professional development. They also help to clarify the broader policy dimensions related to government accountability, the long-term impact on society, human resource implications, inter-departmental relationships, future legislative revisions and federal-provincial relations.

Once the scope and objectives of a project have been established and are well understood by the participants, it becomes possible—indeed necessary—to divide the project into separate steps. In turn, each step should be broken into specific tasks to be accomplished. This breakdown continues until the tasks are indivisible (or the planning-time exceeds task performance-time). One way of distinguishing project objectives from the tasks needed to achieve them is to think of objectives as nouns and tasks as verbs. To allow the team members to understand the organization of tasks—and the milestones that will be discussed a little later—project managers often use charts or maps known as *organigrams* or *work breakdown structures* (WBS).

Like the project objectives, tasks must be clearly defined, attainable and measurable in order to allow the manager to control the project and achieve the desired results.

Other steps

Planning a project also involves the following steps:

- *Establish a project team*: One of the most important elements in the completion of a project is establishing a team capable of completing the project. The members of the team should be as unfettered as possible by ongoing operational responsibilities.
- *Determine what financial resources are needed*: Depending on the project manager's other responsibilities, he or she may have to determine what other resources are needed to complete the project. These might, for example, include consultation costs, particularly travel expenses, as well as fees for outside consultants.
- *Obtain senior management approval of the plan*: The project manager must obtain the approval of senior management before going ahead. This approval extends to the plan itself as well as to any subsequent changes to it.
- *Define any risks associated with the project*: It is important to consult the team members as early as possible to determine what, if any, risks may be associated with the project. This is not a matter of being pessimistic, but instead involves finding solutions to problems that may arise. If something can be done about the problems, it should be reflected in establishing the plan. If a risk cannot be eliminated, its adverse effects can perhaps be minimized. Finally, it is not necessary to identify all possible risks, just the more likely ones.

Scheduling

Scheduling involves determining in what order and when the tasks are to be done as well as who will do them. It is determined within the overall time frame for the project, the skills required for it and basic logic. For each task (as defined in the work breakdown structure), a person responsible and deadlines (start-date, time required and finish-date) are established.

Deadlines

Project management requires a clear understanding of deadlines that must be met at each stage of the process. Final deadlines may be imposed externally, for example, through a government commitment or as a result of a pressing public policy concern. Other deadlines may be less urgent, but no less important, from a project management perspective.

The statement of key milestone dates for each point in the project management process is essential to monitor progress. Failure to achieve key milestone dates is a "wake-up call" that requires immediate attention in order to address any issues that could affect the quality or time frame of the project. A useful source of information in setting achievable target dates can often be found by examining milestone dates set for other legislative projects. Unrealistic target dates are not conducive to good project management.

Critical path

Scheduling also involves establishing a critical path and a system for tracking project milestones.

A critical path is a series of activities used to establish the minimum time frame within which the project can be completed. It is "critical" in the sense that delay in achieving any of the activities will delay completion of the project as a whole. The critical path is established by arranging the different tasks in a logical sequence. Usually, this is done through a *critical path method diagram*. It shows each step in the project and the particular tasks that they involve, together with beginning and end dates for each one with some margin of flexibility.

The milestones consist of as many markers as will allow the project manager and the rest of the team to evaluate their progress through each step and to draw the appropriate conclusions.

Human resources

It is up to the project manager to determine what skills and knowledge are essential to the success of the project. With this information, the manager can obtain the right people for the project.

The clarity of assigned tasks, team member acceptance of their tasks and ongoing consultation with team members and others involved in the project will develop a shared commitment to its completion. It is also important to clearly define reporting relationships and responsibilities among the team members.

Controlling

Controlling the project is the most demanding aspect of managing a project in terms of both the time and effort it requires. It is the basic reason for planning and scheduling the project. A good road map is needed to make sure that the project is going in the right direction.

Controlling the project involves gathering and analysing information about the progress of the project and taking steps to adjust its direction, as needed.

A way of monitoring the work assignments and time frames is required. This may be as simple as weekly meetings or regular progress reports.

New information often requires adjustments to the content of the project and the plan for completing it. Project management involves sharing information openly, cooperatively and when it is needed. It has to be shared not only with the team members, but also with senior managers and, through them, the Minister's office, whose general overview of the project is essential for its success.

A process of continuous improvement should be built into the project. At the various milestones, as well as at the end of the process, team members should acknowledge successfully completing the milestones and be prepared to critically evaluate their performance. Managers should also assess their own performance, along with the team's, in terms of meeting the basic project planning and implementation criteria. Such a review can reveal how to improve the process and to convey this information to other legislative project managers as a way of contributing generally to the public policy process.

Strategic Considerations for Legislative Planning and Management

This table highlights important questions and issues for consideration in planning and managing legislative projects.

	TAKEN INTO ACCOUNT	
QUESTIONS AND ISSUES	YES	NO
Legislative project team • Are team members fully bilingual and able to evaluate drafts critically in both official languages? • Does the team include members who fully understand the Cabinet approval process and parliamentary procedure? • Are the team members able to network at all levels within the Government, with Minister's staff and with staff of the House of Commons and Senate? • Does the team include a legal adviser from the Departmental Legal Services Unit to deal with the many legal questions that necessarily arise in a legislative project? • Do the team members have the appropriate technical skills? (for example, word processing, e-mail, Internet, etc.) • Does the team include administrative support staff?		
Development of Legislative Strategy • What is the priority of the proposed legislative project relative to other bills? – how does it relate to other Government priorities? – was it part of the Speech from the Throne? – was it part of the Budget? – is there a technical reason for the bill (for example, the implementation of an international agreement)? • Which Parliamentary process should be proposed? – normal legislative route – committee study of a bill before Second Reading – Senate consideration of bill before the House of Commons – committee study of policy proposal before a bill is introduced – committee study of a draft bill. • What are the target dates for the Parliamentary phase (taking into account other events)? – introduction in the House of Commons – passage by the House of Commons – introduction in the Senate – passage by the Senate – Royal Assent.		

	Taken into account	
Questions and Issues	**Yes**	**No**
Communications Strategy • What are the public, interest groups and the media saying about the bill? • What is the atmosphere in Parliament and what external events may affect the debate on your bill? • What is the appropriate focus of public communications (for example, why is this a good initiative)? • What media activities could support the strategy?		

Project Planning Templates

The two templates in this chapter are to assist managers, team leaders and working level officials to plan each step in the law making process. For each template, an outline is provided with an example showing how the template might be used.

Product Development Template

This template is very useful during the early stages of legislative development. The key step or activity is listed first (for example, Introduction), along with the anticipated timing (for example, the week of March 12th). Once that is established, the product associated with that step is identified (for example, briefing books and information kits) along with the start and finish dates, the person(s) responsible for drafting and the status of development.

Template

KEY STEP OR ACTIVITY	ANTICIPATED TIMING

PRODUCT	START ON	FINISH BY	RESPONSIBILITY	COMMENTS	STATUS

Example

KEY STEP OR ACTIVITY	ANTICIPATED TIMING
Introduction and first reading	Week of March 12th

PRODUCT	START ON	FINISH BY	RESPONSIBILITY	COMMENTS	STATUS
Briefing books and information kits	January 5	March 5	P. Smith	Senior management to review the advance copy	First draft now being reviewed by legislative project team

Project Time Line Template

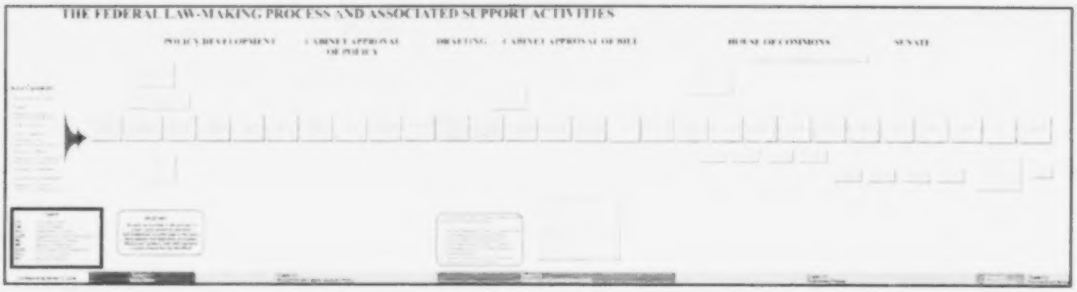
This template can be used at any stage of the law-making process. It is designed to assist officials at every level in the process to generate a basic project plan. Itemize the task, activity, or product to be developed, then fill in the anticipated or earliest start and latest finish dates.

Template

TASK OR STEP	EARLIEST START	LATEST FINISH

Example

TASK OR STEP	EARLIEST START	LATEST FINISH
Prepare Ministerial briefing books	January 5	February 5
Prepare and assemble bill kits	January 19	February 20
Prepare news releases and information packages	February 5	February 28
Draft speeches	February 5	February 28


THE FEDERAL LAW-MAKING PROCESS AND ASSOCIATED SUPPORT ACTIVITIES
POLICY DEVELOPMENT
CABINET APPROVAL OF POLICY
DRAFTING
CABINET APPROVAL OF BILL
HOUSE OF COMMONS
SENATE

Schematic Map of the Federal Law-making Process and Associated Support Activities (Acts)

Versions (click on a version to open)

Note to users: Given the scope and complexity of the data, this schematic map exceeds standard paper and/or screen dimensions. For printing purposes, the map has been formatted to fit within 5 separate 8.5" x 11" pages. Print each page separately and assemble side by side for a complete image.

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- PDF - 8.5" x 14"
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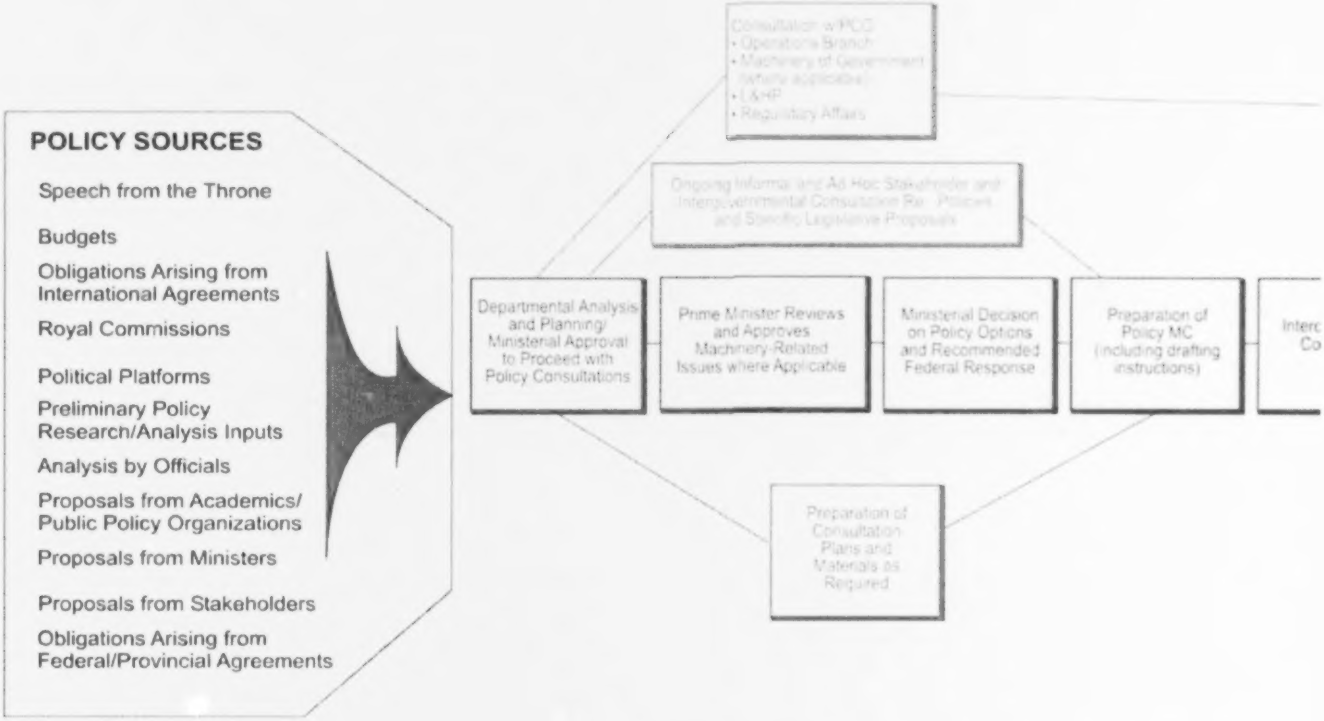
POLICY SOURCES
Speech from the Throne
Budgets
Obligations Arising from International Agreements
Royal Commissions
Political Platforms
Preliminary Policy Research/Analysis Inputs
Analysis by Officials
Proposals from Academics/ Public Policy Organizations
Proposals from Ministers
Proposals from Stakeholders
Obligations Arising from Federal/Provincial Agreements
Consultation w/PCO:
• Operations Branch
• Machinery of Government (where applicable)
• L&HP
• Regulatory Affairs
Ongoing Informal and Ad Hoc Stakeholder and Intergovernmental Consultation Re: Policies and Specific Legislative Proposals
Departmental Analysis and Planning/ Ministerial Approval to Proceed with Policy Consultations
Prime Minister Reviews and Approves Machinery-Related Issues where Applicable
Ministerial Decision on Policy Options and Recommended Federal Response
Preparation of Policy MC (including drafting instructions)
Interc
Co
Preparation of Consultation Plans and Materials as Required

Legend:

CR	Committee Report
DM	Deputy Minister
DOJ	Department of Justice
L&HP	Legislation & House Planning-PCO
MC	Memorandum to Cabinet
MP	Member of Parliament
OGDs	Other Government Departments
PCO	Privy Council Office
RD	Record of Decision

IMPORTANT:

As early as possible in the process, a project team should be identified and established to participate in the policy development and legislative processes. Resources, systems, and administrative support should also be identified.

Corresponding Section in *Guide* Chapter 2.1 - Getting Started

NG PROCESS AND ASSOCIATED SUI

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CABINET APPROVAL OF POLICY

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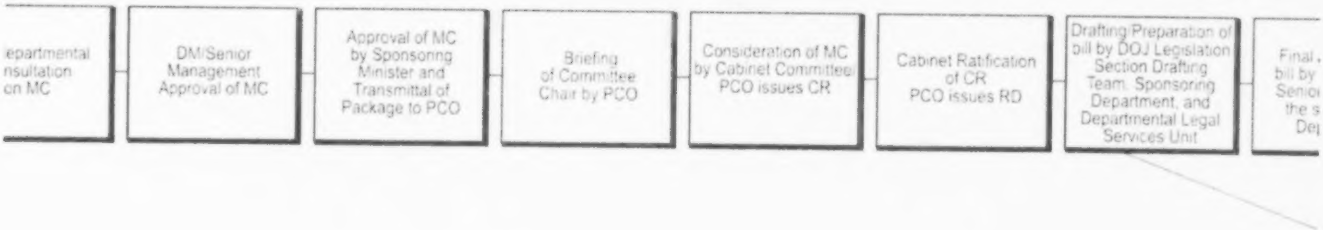
epartmental
nsultation
on MC
DM/Senior Management Approval of MC
Approval of MC by Sponsoring Minister and Transmittal of Package to PCO
Briefing of Committee Chair by PCO
Consideration of MC by Cabinet Committee/ PCO issues CR
Cabinet Ratification of CR PCO issues RD
Drafting/Preparation of bill by DOJ Legislation Section Drafting Team, Sponsoring Department, and Departmental Legal Services Unit
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3. Committee Study (Ho
4. Committee Study of b
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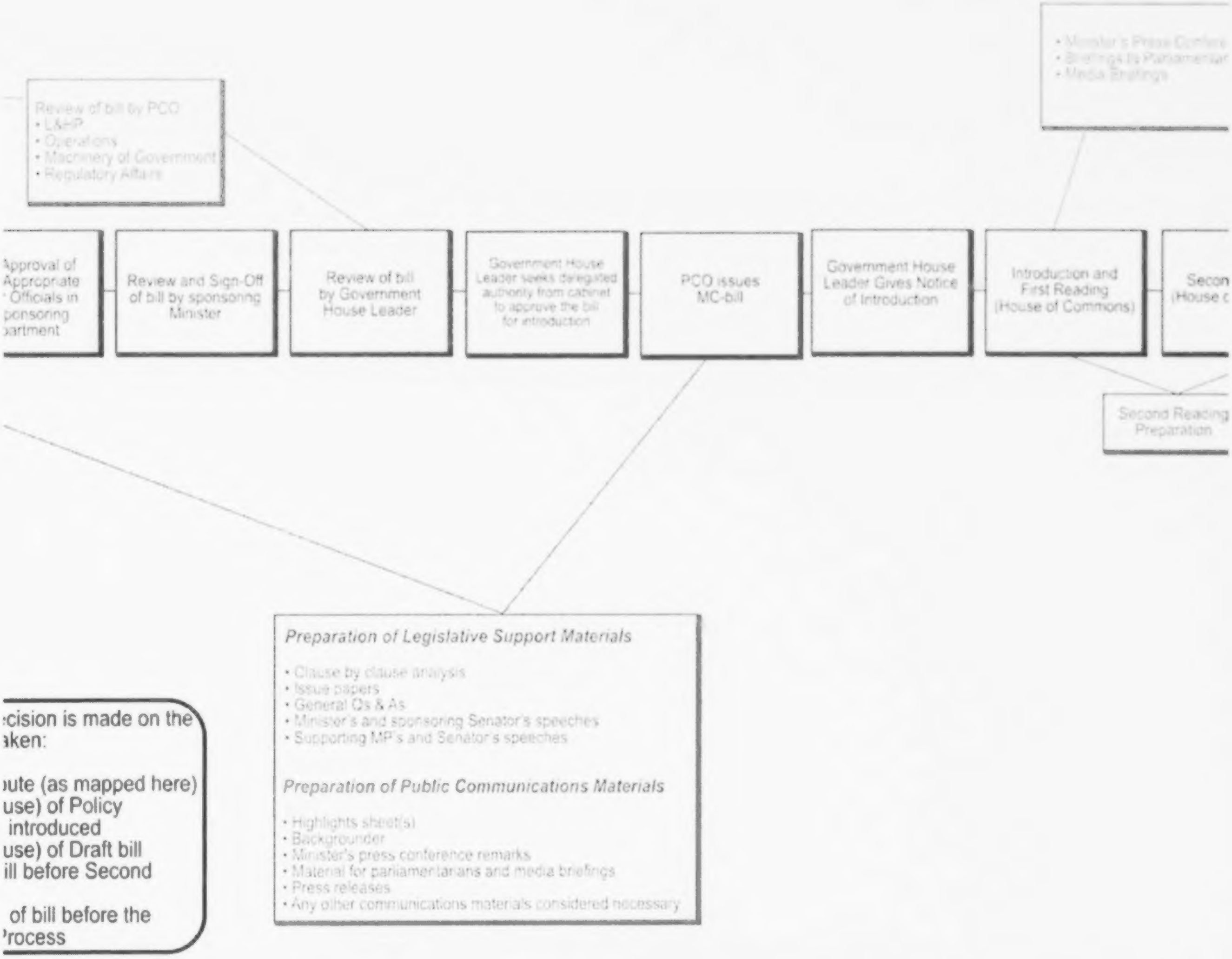
5. Senate Consideration
   House of Commons F

PPORT ACTIVITIES

CABINET APPROVAL OF BILL


Review of bill by PCO
• L&HP
• Operations
• Machinery of Government
• Regulatory Affairs
• Minister's Press Confere
• Briefings to Parliamentar
• Media Briefings
pproval of Appropriate Officials in ponsoring partment
Review and Sign-Off of bill by sponsoring Minister
Review of bill by Government House Leader
Government House Leader seeks delegated authority from cabinet to approve the bill for introduction
PCO issues MC-bill
Government House Leader Gives Notice of Introduction
Introduction and First Reading (House of Commons)
Secon (House c
Second Reading Preparation
Preparation of Legislative Support Materials
• Clause by clause analysis
• Issue papers
• General Qs & As
• Minister's and sponsoring Senator's speeches
• Supporting MP's and Senator's speeches
Preparation of Public Communications Materials
• Highlights sheet(s)
• Backgrounder
• Minister's press conference remarks
• Material for parliamentarians and media briefings
• Press releases
• Any other communications materials considered necessary

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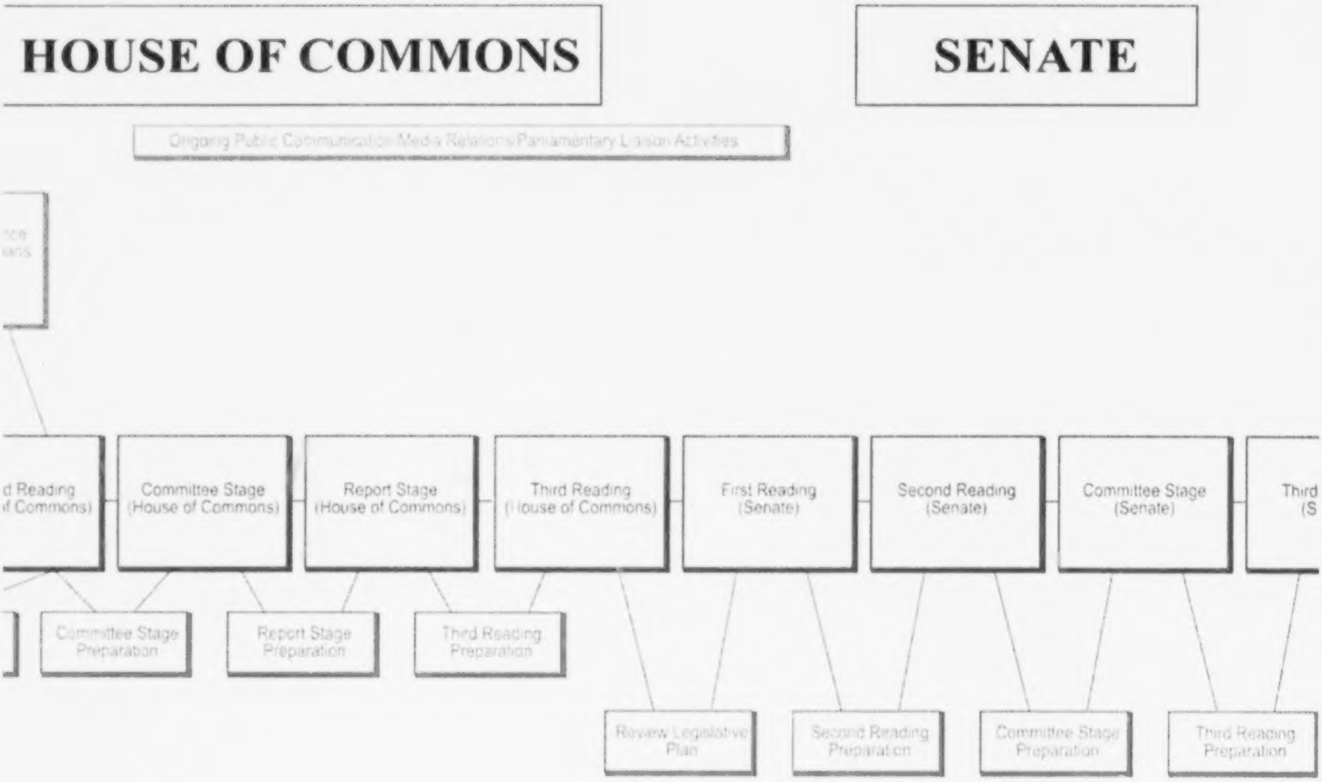
HOUSE OF COMMONS
SENATE
Ongoing Public Communication/Media Relations/Parliamentary Liaison Activities
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Committee Stage Preparation
Report Stage Preparation
Third Reading Preparation
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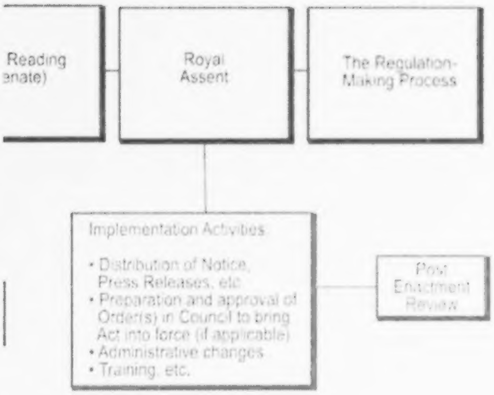
Second Reading Preparation
Committee Stage Preparation
Third Reading Preparation


Reading
enate)
Royal Assent
The Regulation-Making Process
Implementation Activities:
• Distribution of Notice, Press Releases, etc.
• Preparation and approval of Order(s) in Council to bring Act into force (if applicable)
• Administrative changes
• Training, etc.
Post Enactment Review

Chapter 2.2
Development and Cabinet Approval of Policy

Overview

This Chapter supplements section 3 of the *Cabinet Directive on Law-making* by providing information on the various steps involved in policy development and Cabinet approval. It sets out the Good Governance Guidelines and goes on to describe how to prepare a Memorandum to Cabinet (MC), which is a Minister's vehicle for proposing and explaining a legislative measure to the Cabinet and for obtaining its approval. The MC provides context for the drafting instructions that must be developed as part of the MC.

In this chapter

- Summary of the Cabinet Policy Approval Process
- Good Governance Guidelines
- Preparing a Memorandum to Cabinet
- Preparing Bill-drafting Instructions for a Memorandum to Cabinet
- Particular Legal and Policy Considerations
- Activities and Products for Policy Development and Approval
- MC Preparation Planning Calendar

You should also consult

- *Memoranda to Cabinet: A Drafter's Guide*, published by the Privy Council Office (http://www.pco-bcp.gc.ca/default.asp?Language=E&Page=publications&Sub=mc&Doc=mc_e.htm).

Audience

- Officials involved in developing legislative policy and seeking Cabinet approval, particularly those involved in writing or reviewing an MC.

Key Messages

- Before seeking Cabinet approval, thoroughly consider the complex and wide-ranging issues involved in the preparation of legislation.
- Ensure that the bill-drafting instructions in the MC are detailed enough to give Cabinet a clear understanding of what the proposed law is to do and how it is to do it.

- Carefully consider the drafting instructions in order to identify and resolve potential legislative and administrative difficulties.
- Identify sources of funds to cover resulting financial implications for the Government of Canada arising from the implementation of the legislation

Summary of the Cabinet Policy Approval Process

Memorandum to Cabinet and drafting instructions

After a proposed bill is included in the Government's legislative program, the next step is to prepare a submission to Cabinet to seek policy approval and authority to draft the bill. This is done by way of a Memorandum to Cabinet (MC), prepared in accordance with the guidance documents issued by the Privy Council Office. MC drafters should refer to *Memoranda to Cabinet: A Drafter's Guide* (http://www.pco-bcp.gc.ca/default.asp?Language=E&Page=publications&Sub=mc&Doc=mc_e.htm), the *Good Governance Guidelines* and the *MC Preparation Planning Calendar.* When a bill is being proposed, the MC includes an annex of drafting instructions, which provides the framework for drafting the bill. This is a critical component of the MC that demands much care and attention (see also *Preparing Bill-drafting Instructions* for a Memorandum to Cabinet in this chapter).

Main Steps in Cabinet Approval Process

The main steps in preparing an MC are:

- The sponsoring department writes the MC, including the drafting instructions, in cooperation with departmental legal advisers. The Privy Council Office (PCO) should be consulted as early as possible in the process. As set out in the MC Preparation Planning Calendar, the sponsoring department must alert PCO to the draft MC at least 6 weeks before the Cabinet Committee meeting at which it is to be presented. Other departments and central agencies should be consulted as issues arise during the preparation of the MC.
- The sponsoring department hosts a substantive interdepartmental meeting at least 3 weeks before the Cabinet committee meeting to discuss the policy implications of the MC. The meeting includes PCO and the other central agencies as well as all departments whose ministers sit on the Cabinet policy committee that will consider the MC, and other interested departments. The sponsoring department then revises the MC taking into account comments from departments and ensures that it has the support of central agencies and other departments.
- As the central agency that serves as the secretariat to the Cabinet and its committees, PCO performs a challenge function on matters of process, most notably on what consultations are appropriate and on how public interest is determined. It also looks at issues of horizontality and the appropriate level of government

intervention, particularly in terms of efficiency, affordability, federalism and partnerships.

- Once finalized, the sponsoring minister signs the MC and it is sent to PCO. PCO is responsible for distributing the MC to deputy ministers and ministers, for scheduling the item on the agenda of the appropriate Cabinet policy committee and for briefing the committee chair.
- The Cabinet policy committee considers the MC.
- If approved, PCO issues a Cabinet Committee Report (CR), which is then considered by the full Cabinet.
- If there are financial implications, a source of funds must be identified before full Cabinet considers the CR. If the CR is ratified, PCO issues a Record of Decision (RD). Both the CR and the RD are based on the recommendations and drafting instructions contained in the original MC.
- The policy committee or full Cabinet may require changes to the proposal. In such cases, the sponsoring minister may be asked to return with a revised MC, depending on the nature and scope of the changes. A revised CR and RD may also be issued to reflect the changes.
- Once the RD is issued, PCO sends copies to all ministers and deputy ministers (in practice usually to the departments' cabinet affairs units) and to the Legislation Section of the Department of Justice.
- At this stage, drafting may begin.

In exceptional circumstances, where it is necessary to meet the priorities of the Government, drafting may begin before the Cabinet authorization has been formally obtained if the Leader of the Government in the House of Commons so authorizes. This authorization is granted on the advice of the Director of the Legislation Section and the Assistant Secretary to the Cabinet (Legislation and House Planning/Counsel) in consultation with the relevant PCO policy secretariat.

Who does what in the Cabinet Approval Process?

The Cabinet makes policy decisions, including decisions about how policies will be implemented in legislation. These decisions are communicated through the Cabinet's approval of drafting instructions in a memorandum to Cabinet.

Most departments have units responsible for developing policies — including legislative policies — relating to matters for which they are responsible. The officials who work in these units are responsible for linking the various parts of the department in order to develop policies that respond to public concerns and can be effectively implemented.

Because each department is organized differently, it is possible here to describe only two groups of departmental officials: instructing officers and departmental legal advisers. They are responsible for explaining the objectives of the proposed legislative measure in an MC.

Officials in the Operations Secretariat of the Privy Council Office must be involved from the earliest stages.

Others who may assist in one way or another are legislative drafters in the Legislation Section of the Department of Justice.

Instructing Officers

An instructing officer's role is to co-ordinate the efforts of their department. The efforts include analysing and recommending the alternatives available to achieve the policy objectives, as well as communicating to the Cabinet the potential substance of the bill for which authorization is being sought, once the Minister has made a decision. This substance is expressed in the detailed instructions for drafting the bill.

The instructing officers' responsibilities include preparing the bill-drafting instructions for the MC and usually extend to many other aspects of the project, including the communication of detailed instructions to the drafters at the drafting stage.

This stage requires a considerable amount of work. The instructing officers must ensure that the approach adopted has been thoroughly examined. Clear and coherent drafting instructions can be formulated only with a thorough analysis of the issues that may arise. "Preparing Bill-drafting Instructions for a Memorandum to Cabinet" illustrates what elements of the proposed legislative measure must be brought to the attention of Cabinet.

Those who prepare the MC drafting instructions should also provide instructions at the bill-drafting stage. This will provide continuity and ensure that the drafters have the background information they need to draft the bill. The team of instructing officers must:

- be knowledgeable about the subject matter of the proposal;
- be able to formulate the instructions and answer questions about them in both official languages and ensure that each version is well-written and says the same thing;
- be able to make policy decisions as drafting proceeds, or have access to decision makers.

Departmental Legal Adviser

The legal adviser's role is essentially to check the legal aspects of the proposed legislative measure and advise the instructing officer.

First, the legal adviser verifies that the proposed measure is needed to achieve the department's objectives.

Second, if it is needed, the legal adviser checks the legal aspects of the drafting instructions in the MC to ensure that the instructions are consistent in all respects with the applicable legal rules. To assist in this task, he or she may seek the services of the specialized legal counsel at the Department of Justice. If the proposed instructions are legally defective, the legal adviser must propose alternative solutions.

Third, the legal adviser provides information on what is involved in submitting the MC in terms of time constraints, procedure, essential elements of the proposed legislative measure to be brought to the attention of Cabinet and the consequences of Cabinet approval.

Fourth, the legal adviser advises on general principles and policies that may affect the proposed legislative measure, such as policies relating to gender equality, bijuralism and access to government information.

The legal adviser may also act as the instructing officer.

Privy Council Office

The involvement of PCO, beginning at the earliest stages of the development of an MC, is crucial. As the central agency that serves as secretariat to the Cabinet and its policy committees, PCO, and in particular the Operations Branch, is responsible for reviewing policy proposals and providing a foundation to enable consensus on recommendations to Cabinet. It also ensures that policy proposals can be considered strategically by ministers.

Officials in the Operations Branch of PCO perform four functions:

- advising the departmental officials on policy questions and the Cabinet System to ensure coherence with the Government's broad agenda priorities and policy framework;
- ensuring that Departments follow through on the Government's commitments so that they are addressed;
- ensuring that the sponsoring department has followed all steps in the process, including consultation with appropriate departments and agencies;
- posing questions about the proposed legislative measure, including questions about whether it is needed at all;

- ensuring that other interested central agencies are aware of the proposed legislative measure so that it can be thoroughly studied before Cabinet sees it.

Legislative Drafters

Legislative drafters do not systematically participate in preparing the MC. Their main function is to draft legislation once Cabinet has approved the MC. However, departments are increasingly seeking their help— particularly with respect to the formulation of the drafting instructions—to avoid problems at the drafting stage.

Legislative drafters have both a sense of how the legislative process works as well as an overview of federal legislation as a whole. They can assist instructing officers on the following points:

- the policy rationale for the proposed legislative measure,
- determining the legal form the measure may take,
- fitting the measure into the body of federal legislation,
- determining the content of the drafting instructions,
- inserting certain types of provisions into the measure,
- selecting a comprehensive or specific solution to resolve a particular problem,
- determining the time required for drafting and printing the bill.

The advice of legislative drafters may save the instructing officer time and trouble. For example, it may avoid having to go back to Cabinet to obtain authorization to include essential provisions.

Legislative drafters may also advise on general principles and policies that may affect the proposal, particularly on generally accepted drafting principles, such as those expressed in the Legislative Drafting Conventions of the Uniform Law Conference of Canada, available on the Internet at www.law.ualberta.ca/alri/ulc/acts/edraft.htm.

Good Governance Guidelines

The Good Governance Guidelines are a set of analytical criteria for use by departments and Ministers in the assessment and development of policy. They were developed as part of a broader exercise designed to improve policy-making in the federal government and facilitate high quality policy discussions in Cabinet Committees.

POLicy Basics Test	**Has the problem been adequately identified and are the goals and objectives clearly defined?** Are there **horizontal considerations** and **interdependencies** with other priorities or issues (e.g. environment, rural, science, trade, etc.)? Are they in **citizen-focussed** terms? Does this initiative build on and fill **gaps** in existing policy and programs (federal, provincial)? Does the proposal **replace or overlap** any existing program? Will this initiative be sustainable (social, economic, environmental) in the longer term? Have a range of options for the achievement of goals/objectives been considered? The full range and choice of instruments (e.g. legislative, regulatory, expenditures)? Has a feedback mechanism been incorporated into policy and program design to allow for evaluation, fine-tuning, and updating? Is the policy based on sound science advice?
Public Interest Test	**How would the proposal meet the needs of Canadians?** How do the overall **societal benefits compare to its costs**? Have the full range of **risks** been assessed? Does the proposal respect the **rights of Canadians** and take into account their **diverse needs** (e.g. cultural, linguistic, etc.)? Have Canadians been given an opportunity for **meaningful input**?
Government Themes Test	**How would the proposal contribute to the Government's priorities as set out in the Speech from the Throne, the Budget, etc.?** Is it **consistent with current legislative** (e.g. Official Languages Act, Privacy Act, etc.) and **government policy and program guidelines or directives** (e.g. Social Union Framework, Expenditure Management System, Environmental Assessment, F/P/T or international agreements such as WTO and/or NAFTA)? Have other departments been involved in the development of this initiative? Have **opportunities for synergies** (across issues and departments) been identified? What is the plan for **connecting this initiative with Canadians**?

Federal Involvement Test	**What is the rationale for federal involvement in this area (e.g. constitutional, legal, scope of issue)?** Have the particular **federal interests** been adequately identified? How does the initiative balance the need for **coordinated Canada-wide action with the need for flexibility** to reflect the diverse needs and circumstances of provinces and regions?
Question of Accountability Test	**Has an adequate accountability framework been developed? (in particular for multi-stakeholder arrangements)** Have mechanisms been established for ongoing **monitoring , measuring, and reporting to Canadians** on outcomes and performance? Have **eligibility criteria and public service commitments** been made publicly available?
Urging Partnerships	**Can this initiative benefit from joint planning and collaboration?** Has it been designed in a way that **complements existing provincial programming and services**? Are measures in place to ensure **equitable treatment of provinces/regions** - in consideration of their diverse needs and circumstances? [Has consideration been given to the unique character of Quebec in policy and program design?] If a substantial change in funding or design is being considered, have partners, particularly provinces and territories, been **consulted or given advance notice**? Are the **relative roles and contributions** of partners clear? How will they be publicly recognized? Have **opportunities for partnerships** with communities, voluntary sector and private sector been considered? Have mechanisms been established to **consult with Aboriginal peoples**?
Efficiency and Affordability Test	**Will the proposed option be cost-effective?** Does the proposal assess **non-spending options**? Does it consider reallocation options? Would **a joint F/P/T or partnership based effort** result in a more efficient or effective program or service? What are the **longer term funding issues** associated with this proposal – for the federal government, and for its partners? Are there **program integrity** issues related to this initiative (e.g. non-discretionary/legal commitments, risks, strategic investments)? Has the initiative considered **downstream litigation risks** (e.g. potential for trade disputes, Aboriginal claims, etc.)

Preparing a Memorandum to Cabinet

Form and Content

A Memorandum to Cabinet (MC) is a Minister's vehicle for submitting and explaining a proposal to the Cabinet and for obtaining its approval.

An MC conforms to a predetermined structure and style. This makes it easier for Ministers and their advisers to locate the information that interests them so that they can express an opinion on the proposal.

An MC is written in the two official languages and presented in a bilingual format. Both versions must be of equally high quality. This is because an MC is the cornerstone of the drafting process. An inadequately translated version that does not use appropriate terminology may create confusion and waste valuable time. Ministers should be able to expect a carefully written text, regardless of which language they use. Detailed guidance on the form and content of MCs is provided in *Memoranda to Cabinet: A Drafter's Guide,* published by the Privy Council Office (http://www.pco-bcp.gc.ca/default.asp?Language=E&Page=publications&Sub=mc&Doc=mc_e.htm).

An MC is composed of two main parts: the Ministerial Recommendation and the Analysis. Drafting instructions for the bill are included in an annex.

Ministerial Recommendation

The Ministerial Recommendation describes the current situation (the problem) and the solution (legislative measure) being proposed. The financial aspect of the solution is also addressed. This is the only place in the memorandum where the Minister expresses his or her opinions and observations.

The Ministerial Recommendation also includes a communications overview which sets out the main elements of the proposed legislative measure in respect of which communications come into play. The format is provided by the PCO.

A communications plan is contained in an annex to the MC and is prepared by officials responsible for the department's public relations in close collaboration with the Minister's office. The plan anticipates possible public and media reaction to the proposed legislative measure and shows how the Minister intends to present and explain the proposal to the public, in both the short and long term.

The Ministerial Recommendation concludes with the Minister's main recommendation:

> It is recommended that: ... the Legislation Section of the Department of Justice be authorized to draft [title of the bill] in consultation with [the responsible department(s) or bodies] and in accordance with the drafting instructions set out in annex [...]

Analysis

The Analysis describes various options that have been considered, the advantages and disadvantages of each one and their financial implications. It does not express an opinion; it is, instead, a detailed and objective explanation of the context and solutions.

Bill-drafting Instructions

The annex of drafting instructions serves two essential purposes.

- It provides the members of Cabinet with enough information to understand the substance of the proposed legislative measure and make an informed decision, specifically by bringing the main questions to their attention.
- It establishes the framework within which the people most directly involved in the drafting process (legislative drafters, instructing officers and departmental legal advisers) will have to work.

Detailed guidance on preparing drafting instructions follows.

Preparing Bill-drafting Instructions for a Memorandum to Cabinet

Introduction

This section of the Guide provides departmental officials with information about preparing bill-drafting instructions to be included in a Memorandum to Cabinet (MC). Its aim is to provide them with a process that reflects the thinking involved in transforming policy into legislation. This process is presented in the form of a checklist that outlines a series of principal matters to be considered. Each matter is supplemented by detailed questions and comments. By responding to them, officials should be able to prepare drafting instructions that provide a clear, succinct picture of how the approved policy is to be reflected in legislation.

Most of the matters addressed at the MC stage will have to be addressed in more detail when the bill is drafted. But it is a good idea for departmental officials to begin thinking about them as early as possible so that they are well-prepared for the bill-drafting stage. It is particularly important to be ready to provide detailed drafting instructions in both languages so that each language version of the bill can be properly drafted.

Purposes of Drafting Instructions

The drafting instructions in an MC are the basis on which a Government bill is drafted and approved for introduction in Parliament. They both determine and limit what the draft bill is to contain. Drafting instructions serve a number of related purposes:

- act as a key mechanism for the Cabinet's control over the legislative process by giving Ministers a more detailed view of how the policy they are approving will be reflected in legislation;
- provide an opportunity for the sponsoring department to think through its proposals;
- provide an opportunity for other departments to appreciate how, if at all, the proposals will affect them;
- guide the legislative drafters who eventually have to draft the bill;
- serve as a benchmark for assessing whether the draft bill does what Cabinet authorized, or whether additional authority must be sought for particular provisions of the bill.

Format and Style

Drafting instructions should be written in clear, straightforward language. They should not be in "legal" language or attempt to dictate the wording of the bill. They should be prepared keeping in mind the purposes outlined above.

The checklist that follows covers a wide range of matters and prompts instructing officers to think about the details needed to draft legislation. However, many of these details do not have to be specifically expressed in the MC drafting instructions, and indeed they should not be.

The drafting instructions should steer a course between the extremes of too much detail and too little. On the one hand, the drafting instructions should be general enough to allow flexibility for minor policy questions to be worked out in the drafting process. On the other hand, they should not provide carte blanche authority to draft legislation for vaguely defined policy objectives, without any indication of how the objectives are to be achieved.

It is important to find a balance between high-quality information that provides an understanding of the most important issues and a degree of flexibility that allows for unforeseen questions to be addressed.

Checklist for Preparing Bill-drafting Instructions for a Memorandum to Cabinet

This checklist covers the following elements:

Getting Started

- Main objectives of the proposal
- Time needed to prepare drafting instructions
- Public commitments

General Legal and Policy Matters

- Legal context
- Policy context
- Resources
- Legal instruments for accomplishing policy objectives

Legal Structure of the Proposal

- Combining matters in a single bill
- Types of legal instruments

- Provisions that should be in the Act
- Provisions that should be in regulations
- Incorporation by reference
- Administrative instruments
- Recipients of powers

Particular provisions

- Titles
- Preambles and purpose clauses
- General application provisions
- Application to the Crown
- Public bodies and offices
- Senior appointments
- Financial provisions
- Information provisions
- Monitoring compliance
- Sanctions for noncompliance
- Enforcement powers
- Appeals and review mechanisms
- Dispute resolution mechanisms
- Extraordinary provisions

Technical legislative matters

- Sunset and review provisions
- Repeals
- Consequential and conditional amendments
- Transitional provisions
- Coming into force

Finishing touches

- Internal consultation
- External consultation
- Time needed for drafting the bill and implementing the Act
- Outstanding matters

Getting Started

MATTERS	QUESTIONS AND COMMENTS
Main objectives of the proposal	**What are the main objectives of the proposal?** It is essential for the sponsoring department to clearly articulate the precise purpose of proposed legislation, so that Cabinet and the drafters properly understand what the legislation is supposed to achieve. For amending bills that are intended to accomplish a number of different purposes, the instructions should explain these purposes separately in relation to the provisions that are to be amended. They should also include a general instruction to make consequential amendments to other provisions.
Time needed to prepare drafting instructions	**Is there enough time to prepare the drafting instructions?** Thinking through the detail of drafting instructions will raise policy issues that were not identified when ideas were expressed in general terms in the policy development stage. Time will be needed to address and resolve these issues. The sponsoring department must be prepared to spend the time necessary to produce a coherent set of provisions to implement their proposals. Unresolved issues haunt a legislative project until they are resolved and it is wiser and more efficient in the long run to resolve as much as possible at the Memorandum to Cabinet stage, before the actual drafting begins. The time spent in thinking through drafting instructions is well worth it. Good drafting instructions will avoid: • Delays in drafting the bill because of unresolved policy questions; • Having to go back to Cabinet to clarify policy issues that were not adequately resolved in the original Memorandum to Cabinet; • Having to propose amendments in Parliament because the policy was still in flux after the bill was introduced or because the two language versions were not consistent; • Being left without the necessary legal authority after the Bill is passed to draft the regulations required to complete the legislative scheme. Departments should not rely on time frames that have been established before the legislative drafter has been consulted. The time needed to prepare the draft may be much greater than the department expects.
Public commitments	**Has the Government or the Minister made any public commitments, either generally or about the specific legislative proposal, that will affect its contents or timing?** Often when legislative policy is being developed, the Government or a Minister makes commitments about it, such as promising to consult with stakeholders or guaranteeing that the legislation would be framed in a certain way. They may also make general commitments, such as those in the Federal Gender Equality Action Plan approved by the Cabinet in 1995. These public commitments could affect the timing of the legislation or require it to be framed in a certain way. Stakeholders or provincial governments are sometimes consulted on the draft proposals. When the aim of consultations is a negotiated agreement on wording that is to be proposed in the legislation, drafters should be consulted before specific wording is agreed on.

General Legal and Policy Matters

MATTERS	QUESTIONS AND COMMENTS
Legal context	**What legal considerations affect the proposal?** This portion of the drafting instructions should be completed by the departmental legal adviser. It involves an assessment of the law related to the proposal in order to ensure that the resulting legislation will operate effectively. Some areas of particular concern are: • Does Parliament have constitutional authority to enact the legislation? • Will it affect matters within provincial jurisdiction? • Is it consistent with the Canadian Charter of Rights and Freedoms, the Canadian Bill of Rights and the International Covenant on Human Rights? – Note that the Cabinet Support System instituted in 1991 requires the Analysis section of the MC to address the legal implications of the proposal, particularly those relating to the Charter and the constitutional division of powers. (see also "Constitutional Issues and the Cabinet Support System" in this chapter). • Does the proposal raise any gender or other equality issues? – Consult the handbook entitled "Diversity and Justice: Perspectives on Gender Equality", the gender equality specialists in the various sections of the Department of Justice or the Office of the Senior Advisor on Gender Equality and Diversity in that Department. • Is it consistent with important Acts of general application, such as the *Access to Information Act*, the *Privacy Act*, the *Official Languages Act* and the *Financial Administration Act*? • Do any of the proposed provisions unnecessarily duplicate provisions in the *Interpretation Act*, the *Criminal Code*, or any other Acts of general application? If they are not quite the same, is there a good reason for the difference? • Do any elements of the proposal conflict with other legislation? – Any conflicting legislation should be specifically identified and the conflict should not be resolved by a general "notwithstanding" provision. • Does the proposal deal with matters that are also dealt with by another bill that is being prepared or has been introduced in Parliament? If so, are the officials responsible for that bill aware of the overlap? • Does the proposal respond effectively to any court decisions or legal opinions that gave rise to the legislation or any of its elements? • Are there any international agreements to which Canada is a signatory that have a bearing on the proposal? • Does the proposal rely on provincial private law (for example, contracts or property) to supplement it? If so, have both legal systems (civil law in Quebec and common law elsewhere) been considered? – You can consult the Civil Code Section of the Department of Justice about legal concepts and institutions of the civil law of Quebec.
Policy context	**Do any Government policies affect the proposal?** There are a number of policies approved by the Cabinet that may have a bearing on the proposal. They must be considered to ensure that the proposal is consistent with them. These policies include:

MATTERS	QUESTIONS AND COMMENTS
	• *1999 Cabinet Directive on Environmental Assessment of Policy, Plan and Program Proposals*, Canadian Environmental Assessment Agency http://www.ceaa-acee.gc.ca/0012/0006/sea_e.htm; • *Regulatory Policy*, approved by the Treasury Board in http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&Page=Publications; • Federal Gender Equality Action Plan, approved by the Cabinet in 1995; • *Cabinet Directive on Law-making*, approved by the Cabinet in 1999 (set out at the beginning of this Guide); • *Federal Identity Program*: http://www.tbs-sct.gc.ca/pubs_pol/sipubs/tb_fip/siglist_e.html. One of the best ways to ensure consistency with government policies is by consulting the officials who are likely to know about them.
Resources	**Who will incur costs as a result of the legislation?** If non-federal bodies will incur costs as a result of the legislation, a strategy must be indentified for managing their reaction or obtaining their support. If there are new federal costs associated with implementing or complying with the proposed legislation, a source of funding will be needed before Cabinet approval.
Legal instruments for accomplishing policy objectives	**How will the policy objectives of the proposal be accomplished?** As discussed above in Chapter 1.1 "Choosing the Right Tools to Accomplish Policy Objectives", there are many legal mechanisms available for implementing policy objectives. These include: • The creation of public bodies and offices; • The conferral of powers and duties on public officials; • Rules that regulate, prohibit, require or authorize particular activities; • The creation of sanctions for non-compliance with the rules. Some particular mechanisms that are often adopted include: • Licensing schemes directed toward controlling particular activities; • Monitoring and enforcement provisions. For further information on these mechanisms, consult *Designing Regulatory Laws that Work* published by the Constitutional and Administrative Law Section of the Department of Justice. See also "Enforcement Powers" in this chapter. As far as possible, the instructions should provide a picture of how the legislation will actually work, describing the type of machinery envisaged and the necessary powers and duties, including how the legislation will be enforced.

Legal Structure of the Proposal

MATTERS	QUESTIONS AND COMMENTS
Combining matters in a single bill	**What should be included in a single bill?** Related matters should be combined in one bill, rather than being divided among several bills on similar subjects. A single bill allows parliamentarians to make the most effective and efficient use of their time for debate and study in committee. However, matters should only be combined if it is appropriate and consistent with legislative drafting principles. Titles to Acts are among the most important tools people use to find the law. If very different matters are combined in one Act, it becomes more difficult for people to find the law relating to the matters that concern them.
Types of legal instruments	**What types of legal instruments should be used?** There are many legal instruments and other related documents available to implement policy. They fall into three categories: • Acts • Regulations • Administrative documents (for example, contracts, internal directives, bulletins, decision documents). Both Acts and regulations are forms of law, with the same legal effect. Administrative documents do not necessarily have legal effect. Additional differences among these categories involve the procedures used to make them. Statutes involve the parliamentary process while regulations are governed by the requirements of the *Statutory Instruments Act*. There are no general statutory requirements for other subordinate documents, although they are sometimes subject to particular requirements such as those relating to natural justice. The provisions of an Act must fit together in a coherent scheme with the regulations and administrative documents that it authorizes. This means that the authority to make regulations and administrative documents must be established by the Act, either expressly or impliedly.
Provisions that should be in the Act	**What should be in the Act?** Generally speaking, the Act contains the fundamental policy or underlying principles of legislation that are unlikely to change. The following additional matters are usually dealt with in the Act: • Provisions that might substantially affect personal rights (search and seizure powers, penalties for serious offences, expropriation); • Provisions establishing the structure of public bodies or providing for senior appointments; • Controversial matters that should be addressed in Parliament; • Amendments to Acts, including the definition of terms used in Acts.

MATTERS	QUESTIONS AND COMMENTS
Provisions that should be in regulations	**What should be in regulations?** Regulations should deal with matters of a legislative (as opposed to administrative) nature that are subordinate to the main principles enunciated in the Act. This includes: • Procedural matters, for example, how to apply for a licence; • Matters that are likely to need adjusting often, for example, prescribing interest rates, setting annual fishing quotas; • Technical matters involving scientific or other expertise; • Rules that can only be made after the department gains some experience in administering the new Act, for example, prescribing the time within which certain steps should be taken; • Fees applicable to a broad sector of the public. Some regulation-making powers require specific Cabinet approval. The drafting instructions must specifically provide authority to do any of the following things and the MC must provide reasons for requesting this authority: • Substantially affect personal rights and liberties; • Determine important matters of policy or principle; • Amend or add to the enabling Act or other Acts; • Exclude the ordinary jurisdiction of the Courts; • Apply retroactively; • Sub-delegate regulation-making authority; • Impose a charge on public revenue or a tax on the public; • Set the penalties for offences (other than administrative monetary penalties). Finally, consider what, if any, procedural requirements should apply to making the regulations, for example, are the requirements of the *Statutory Instruments Act* and the *Regulatory Policy* appropriate (see Summary of the "Regulatory Process" in part 3). • Note, however, that if an instrument of a legislative nature is to be expressly exempted from the requirements of the *Statutory Instruments Act* and the *Regulatory Policy*, the drafting instructions must specifically provide authority for the exemption and the MC must provide reasons for requesting this authority.
Incorporation by reference	**Should some matters be dealt with through documents or laws incorporated by reference?** Legislation does not have to spell out all the details of what it requires or provides. It can instead refer to other laws or documents and incorporate their contents without reproducing them. If this is to be done in regulations, consideration should be given to whether particular authorizing provisions are needed. Incorporation by reference is also subject to constitutional requirements governing the publication of laws in both official languages as well as requirements relating to the accessibility and intelligibility of incorporated documents. Departmental Legal Advisers can provide guidance on these questions on the basis of the Legal Policy Statement on Incorporation by Reference issued by the Deputy Minister of Justice.

MATTERS	QUESTIONS AND COMMENTS
Administrative instruments	**What should be dealt with through administrative instruments?** Many of the elements of a regulatory scheme should be dealt with in administrative instruments, such as permits, licences, directives or contracts. These include • legal requirements that are to be imposed individually on a case-by-case basis; • fees imposed in accordance with procedures such as those in sections 21-23 of the *Department of Industry Act*; • non-binding guidelines; • internal directives on administrative matters.
Recipients of powers	**Who should powers be given to?** Regulation-making powers • Ordinarily, the Governor in Council is authorized to make regulations. A rationale for departures from this practice needs to be provided in the MC. • In some cases, independent regulatory tribunals, such as the National Energy Board, are given regulation-making powers, but their regulations are often subject to the approval of the Governor in Council. Judicial and quasi-judicial powers • Judicial and quasi-judicial powers must be exercised with impartiality and the delegates who exercise them should have the qualifications and security of tenure to ensure their impartiality. Administrative powers • Most administrative powers are given to Ministers who, in turn, have implied authority to authorize officials in their departments to exercise them. • These powers should not be given to the Governor in Council, except powers to make very senior appointments or power relating to international obligations or publicly sensitive matters. • Inspection and enforcement powers are usually given to classes of officials created to exercise these powers.

Particular Provisions

MATTERS	QUESTIONS AND COMMENTS
Titles	**What will be the title of the bill?** Each bill has a long title, which sets out the scope of the bill and gives a brief description of its purpose. The wording of this title should be left to the bill-drafting stage. A bill to enact a new Act also has a short title, which is used to identify the Act when discussing it or referring to it in other legislation. A short title is also sometimes included in an amending Act that is likely to be referred to in other Acts. A short title should succinctly indicate the Act's subject matter. The following are examples of the long and short titles of an Act: • An Act to provide for the financial administration of the Government of Canada, the establishment and maintenance of the accounts of Canada and the control of Crown corporations; • *Financial Administration Act*.

MATTERS	QUESTIONS AND COMMENTS
	Finalizing the short title should also be left to the bill-drafting stage. However, a working title is needed from an early stage and care should be taken to establish an appropriate title since it often becomes more difficult to change as the proposal moves forward. Short titles must be consistent with the *Federal Identity Program* http://www.tbs-sct.gc.ca/Pubs_pol/sipubs/TB_fip/siglist_e.html. It is also important to ensure that both language versions of the title are equivalent and idiomatic. You should beware of using a word in one language just because it is like a word in the other. In the English version, the first word in the short title determines the Act's indexed place in the statute book. Try to avoid words such as "Canadian," "National," "Federal" and "Government" because they make it harder to find the Act by its subject matter in a table of statutes. You may consult the Legislation Section when choosing a title. You must also consult the Machinery of Government Secretariat of PCO about the name of any new public body, which also usually appears in the title (see below "Public bodies and offices").
Preambles and purpose clauses	**Should there be a preamble or purpose clause?** Preambles and purpose clauses should not be included in a bill without carefully thinking about what they would add to the bill and what they would contain. They should not be used to make political statements. They can have a significant impact on how the legislation is interpreted by the courts. Preambles and purpose clauses perform different, but overlapping functions. Preambles: • can often provide important background information needed for a clear understanding of the bill, or to explain matters that support its constitutionality; • are placed at the front of the bill; • should be drafted sparingly to avoid creating confusion about the meaning of the legislation. Purpose clauses: • indicate what the intended results of the legislation are; • should highlight only the principal purposes; • are included in the body of the legislation; • generally have a greater effect on the interpretation of legislation than preambles. When a bill amends an existing Act, only the amendments themselves are added to the text of the Act when it is reprinted in a consolidated form. The preamble is not included. In order to ensure public awareness of, and access to, background information for an amending bill, a purpose clause may be considered as an alternative because it can be integrated into the consolidated legislation. Both preambles and purpose clauses must be carefully reviewed by the Department of Justice for appropriate language and content.
General application provisions	**Should the application of the Act be confined or expanded in any way?** It is possible to confine or expand the application of the Act in a number of ways: • geographically (for example, in particular provinces or territories);

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	• temporally (for example, to particular periods of time); • jurisdictionally (for example, to the extent that particular matters are within the constitutional authority of Parliament); • in terms of the subject matter governed by other Acts (for example, to the extent that particular matters are not regulated under other Acts). However, application provisions often raise complex legal questions that must be fully explored before they are included. For example, applying an Act outside raises many international law questions, some of which are addressed in the *Oceans Act*.
Application to the Crown	**Should the Act be binding on the Crown?** Legislation does not bind the Crown unless the legislation expressly or impliedly provides that it does. You should consider whether the Act should do so, taking into account the following: • binding the Crown may entail additional legal liability for government activities; • not binding the Crown may render the legislation less effective if it governs an activity that the Crown carries on to a significant degree; • agents of the Crown (for example, Crown corporations) generally benefit from Crown immunity, which may give them an advantage over private sector competitors; • the Crown has not only a federal aspect, but also provincial and international (Commonwealth) aspects, any or all of which may be bound. Other governments and departments affected by the legislation should be fully consulted before a provision to bind the Crown is included.
Public bodies and offices	**What public bodies or offices will be needed?** The creation of public bodies and offices are matters falling within the prerogatives of the Prime Minister. Proposals for their creation must be discussed with the Machinery of Government Secretariat and the Management Priorities and Senior Personnel Secretariat of the Privy Council Office. The nature and structure of public bodies and offices vary widely, depending on the functions they are to perform. The following are some of the important aspects to consider when creating a public body: • what name will it have? • where will its headquarters be located? • will it be a corporation? – if so, section 90 of the *Financial Administration Act* requires parliamentary approval for the incorporation of a corporation or the acquisition of shares on behalf of the Crown. • will it have the capacity of a natural person or will its powers be set out in detail? • will it be able to enter into contracts, either in its own name or on behalf of the Crown? • will it be able to acquire and dispose of property (note the Department of Public Works and Government Services Act and Federal Real Property Act)? • will the Auditor General be its auditor (note the *Auditor General Act*)? • will it be subject to the *Canadian Environmental Assessment Act* or review by the Commissioner for Sustainable Development under the Auditor General Act? • will it be an agent of the Crown (and benefit from the non-application of

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	legislation to the Crown)? • which minister will be responsible for it? • will it report to Parliament? • how many members will it have? • will there be executive officers (chairperson, secretary, etc.)? • how will the members and executive officers be appointed? (see the next box) • will the body, or any of its members or staff, be part of the public service and subject to general public service legislation such as: – *Financial Administration Act* – *Public Service Staff Relations Act* – *Public Service Employment Act* – *Employment Equity Act* – *Public Service Superannuation Act* – *Access to Information Act* – *Privacy Act* – *Official Languages Act* The Alternative Service Delivery Office of the Treasury Board Secretariat and the Constitutional and Administrative Law Section of the Department of Justice should also be consulted on these matters. Further information can be found in *A Manual for Designing Administrative Tribunals* published by the Constitutional and Administrative Law Section of the Department of Justice.
Senior appointments	**Will the Act authorize the appointment of members of boards and tribunals and other senior officials?** Mechanisms for appointing these officials fall within the prerogatives of the Prime Minister. Proposals for legislation dealing with these appointments must be referred to the Machinery of Government Secretariat and the Management Priorities and Senior Personnel Secretariat of the Privy Council Office, including legislation dealing with: • how these officials are to be appointed; • what their tenure of office will be; • what their status or rank will be (for example, as a deputy head); • what public service legislation will apply to them (see previous box). If the terms and conditions of employment of an official to be appointed by the Governor in Council are not described expressly in the legislation, they will be established by the Management Priorities and Senior Personnel Branch of the Privy Council Office within the parameters of sections 23 and 24 of the *Interpretation Act*. These appointments are usually made by the Governor in Council.
Financial provisions	**Will there be provisions involving the collection or disposition of public money?** The *Financial Administration Act* is the main Act governing the collection and disposition of public money. It will apply unless there is an express provision to the contrary. Particular attention should be paid to that Act when creating a public body or office. The Department of Finance must be consulted about any proposal to:

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	• create a special account in the Consolidated Revenue Fund; • authorize a public body to deal with money without going through the Consolidated Revenue Fund; • provide guarantees or indemnification; • create an ongoing statutory appropriation; • authorize the borrowing of money. For additional information on financial provisions, see Department of Justice *Financial Administration Act Commentary* published by the Legal Operations Sector of the Department of Justice.
Information provisions	**Will the legislation restrict or require the disclosure of information?** The disclosure of information is governed by the *Access to Information Act* and the *Privacy Act*. It is also affected by legal concepts of confidentiality and privilege. Provisions affecting the disclosure of information should be reviewed in light of these requirements [illegible] discussed with the Information Law and Privacy Section of the Department of Justice. Proposals to authorize the use of Social Insurance Numbers require specific Cabinet approval.
Monitoring compliance	**Should there be provisions for monitoring compliance with the legislation?** Provisions for monitoring compliance should be considered to ensure that the legislation is effective. These provisions authorize or require inspections or analyses to be conducted on a routine basis (as opposed to when there is suspicion of wrongdoing: see below "Enforcement powers"). You should consider who will conduct the monitoring activities and the circumstances in which they may be conducted.
Sanctions for non-compliance	**Will penalties or other sanctions be needed to ensure compliance with the legislation?** Most legislation is enforced by the imposition of sanctions for non-compliance. They range from penal sanctions, such as fines and imprisonment, to administrative sanctions, such as licence suspensions or disqualifications. There are three basic methods of imposing sanctions: • through the prosecution of offences in the courts; • through offence ticketing schemes, such as the *Contraventions Act*; • through the imposition of administrative monetary penalties or other administrative sanctions. Provisions for the imposition of penal sanctions should reflect the principles set out in sections 718 to 718.2 of the *Criminal Code*. They should be reviewed to ensure that: • they will be effective in obtaining compliance; • there will be effective enforcement mechanisms, such as powers to conduct inspections or searches; • the sanctions are appropriate for the seriousness of the noncompliant behaviour; • the sanctions are variable enough to reflect the circumstances of the accused person in order to ensure that they receive equal treatment under the law. If administrative sanctions are to be imposed, a mechanism will be needed for their

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	imposition. The creation of this mechanism raises many legal and policy choices to be considered, including choices about • Strict or absolute liability; • The processes by which liability for and the amount of a sanction will be determined; • The relationship of the administrative sanctions to criminal prosecution; • The institutional structure of required impartial review. See also "Proportionality of Sentences for Offences" in this chapter and *Designing Regulatory Laws that Work* published by the Constitutional and Administrative Law Section of the Department of Justice.
Enforcement powers	**Should the Act authorize searches, seizures and other action to support the prosecution of offences?** The *Criminal Code* provides a basic set of powers for the enforcement of federal legislation, including powers to make arrests, conduct searches and seize things (see "Acts of general application, Criminal Code" in Chapter 1.2). However, these powers may not be sufficient or they may have to be supplemented. Alternative or supplementary enforcement powers should be developed in accordance with: • Guidelines for Granting Enforcement Powers under Federal Legislation, • Principles for the Attribution of Federal Enforcement Powers (See "Particular Legal and Policy Considerations" in this chapter)
Appeals and review mechanisms	**Should there be procedures for appealing or reviewing decisions of administrative bodies created or authorized to make decisions under the Act?** Judicial Review The *Federal Court Act* provides that the Federal Court may review the decisions of any "federal board, commission or tribunal." This review concerns the legality of the decisions, as opposed to their merits. In most cases, applications for review are heard by the Trial Division of the Court. However, section 28 of that Act specifies bodies whose decisions are reviewed by the Court of Appeal. Appeals Appeals generally concern the merits as well as the legality of decisions. A right of appeal exists only if it is granted expressly by the Act. Appeals may be taken to the courts (usually the Federal Court) or to an administrative tribunal created by the Act (see also "Creation of public bodies and offices" in this checklist). A decision is not generally subject to judicial review if it is subject to appeal. Review It may also be appropriate to create other review mechanisms (in addition to judicial review and appeal). A decision-making body may be authorized to review its own decisions. Another body (Review Committee, Revision Office, Council, etc.) may be created to review the decision or an existing body (for example, the Cabinet) may be authorized to review them. Unlike appeals, which are limited to particular grounds of appeal, reviews may concern all aspects of the original decision, as if a new decision were being made.
Dispute	**Should there be mechanisms for the resolution of disputes arising under the**

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resolution mechanisms	**legislation?** Consideration should be given to including provisions for the resolution of disputes instead of relying on the courts, whose procedures are usually costly and involved. Some examples of dispute resolution mechanisms are negotiation, mediation and neutral evaluation. The Dispute Resolution Services of the Department of Justice provides advice on dispute resolution mechanisms. Further guidance can be found in two documents published by the Department of Justice. The first is *Dispute Resolution Reference Guide* prepared by the Dispute Resolution Services. The second is *Designing Regulatory Laws that Work* prepared by the Constitutional and Administrative Law Section.
Extraordinary provisions	**Does the proposal include any extraordinary provisions requiring specific Cabinet approval?** Certain types of provisions should be specifically identified because they may be controversial. Ministers must be made aware of them so that they can properly assess whether they should be included in the legislation. These sorts of provisions involve: • the retroactive application of legislation; • broad powers to grant exemptions from the legislation; • power to subdelegate regulation-making powers; • excluding the jurisdiction of the courts; • expropriation of property; • emergency powers; • substantial restrictions on fundamental rights or freedoms; • regulation-making powers dealing with matters that are usually provided for in Acts (see above "*What should be in the Act*").

Technical Legislative Matters

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Sunset and review provisions	**Should provisions be included for the expiry or review of the Act?** Caution should be taken when considering whether to include a "sunset" or expiration provision in a bill, since these provisions may result in a gap of legal authority if the new legislative regime cannot be brought into force in time. Similarly, caution should be taken when considering inclusion of a provision for mandatory review of the Act within a particular time or by a particular committee given that this limits Parliament's flexibility. Alternatives to these provisions should be fully explored before proposing to include them.
Repeal	**Are there any Acts or regulations that have to be repealed as a result of the legislation?** If a new Act is proposed to replace an existing Act, the existing Act will have to be repealed. It may also be necessary to repeal particular provisions of related Acts as well as regulations. If these provisions or regulations are administered by other departments, these departments must be consulted.
Consequential and coordinating amendments	**Are there any Acts or regulations that will have to be amended as the result of the legislation?** New legislation often affects provisions in other Acts. One of the most common examples of this occurs when the name of an Act is changed. References to the Act in other legislation must be amended to reflect the change. You should also determine whether any other legislation amends the same provisions. If so, amendments will be needed to co-ordinate the amendments so that one does not undo the other.
Transitional provisions	**Will any transitional provisions be needed to deal with matters arising before the Act comes into force?** Whenever changes are made to the law, consideration should be given to matters that arose under the previous law, but which are still ongoing after the new law comes into force. These matters include: • regulations made under the previous law; • rights or benefits granted under the previous law; • appointments to offices; • offences committed under the previous law; • judicial or administrative proceedings involving the application of the previous law. Many of these matters are governed by the general transitional provisions in sections 43 and 44 of the *Interpretation Act*. However, these provisions may not provide the result intended in all cases. It may also be unclear how they apply in particular cases. Special transitional provisions are often needed, particularly when: • an administrative body is abolished and another created to take its place; • money appropriated for the purposes of the repealed Act is to be used for the purposes of a new Act.

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	Finally, regulations made under existing legislation should be reviewed to determine which of them should continue in force under the new legislation and to ensure that they are compatible with it. Regulations should be expressly repealed if they are not intended to continue in force. This will avoid doubts about their status.
Coming into force	**When should the Act come into force?** When an Act comes into force, it begins to operate as law. An Act comes into force on the day it receives Royal Assent, unless it says otherwise. There are a number of options. It may come into force • on a specified day; • on a day dependent on a specific event (for example, the coming-into-force of another Act); • on a day to be fixed by order of the Governor in Council. An Act may also provide that different provisions may come into force on different days. If a provision for an Act to come into force retroactively is to be included, it must be clearly authorized by the drafting instructions.

Finishing Touches

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Internal consultation	**Will any other affected Ministers, departments or agencies of the federal government have to be consulted on drafting the bill?** Ministers, departments or agencies who are consulted on the policy proposals should also be given the opportunity to comment on the drafting instructions. This is particularly so when consequential amendments are proposed to legislation administered by those departments. Consider the following questions: • Have the affected departments or agencies had an opportunity to review the drafting instructions? • Are there any outstanding issues that need to be addressed before final drafting instructions can be given? • Are there other bills or Acts administered by other departments or agencies that will be affected by the legislation? • Are there other Ministers who will have legal responsibilities or powers under the proposed legislation? • Is there an agreement in place about the extent of those responsibilities or powers? You should also consider whether consultation may result in changes to the policy and whether Cabinet approval will be needed for the changes.
External consultation	**Will any consultation with other governments, non-governmental bodies or the public be needed on the draft bill?** Consultation on draft legislation may be carried out with persons outside the federal government if the MC states that intention and asks for the Cabinet's agreement.

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	You should also consider whether consultation may result in changes to the policy and whether Cabinet approval will be needed for the changes.
Time needed for drafting the bill and implementing the Act	**How should drafting and implementation time frames be established?** Ministers usually want to know how long it will take to draft the required bill. These time frames are rarely expressed in the MC or the resulting Cabinet decision, but are established on a less formal basis. They should be determined in consultation with the Legislation and House Planning/Counsel Secretariat of the Privy Council Office and the Legislative Services Branch of Justice, taking into account: • the complexity of the bill; • the degree to which the underlying policy is developed or developing; • the drafting resources available. Implementation dates are also sometimes considered at this stage, although it is impossible to predict how long it will take Parliament to deal with the bill. Additional factors should also be taken into account in establishing implementation dates, including: • the work required to draft any necessary regulations (including any amendments to existing regulations); • administrative, staffing and training arrangements needed.
Outstanding matters	**Are there any matters that still have to be resolved?** It is sometimes not possible to resolve all policy issues without unduly delaying the preparation of the bill. In these cases, the MC may identify these matters and provide that they are to be resolved through a supplementary MC or by some other means.

Particular Legal and Policy Considerations

When preparing legislative proposals, consideration should be given to the legal framework (See Chapter 1.2, "Legal Considerations") as well as Government policies, such as:

- *1999 Cabinet Directive on Environmental Assessment of Policy, Plan and Program Proposals*, Canadian Environmental Assessment Agency http://www.ceaa-acee.gc.ca/0012/0006/sea_e.htm;
- *Regulatory Policy*, approved by the Treasury Board in 1995: http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&Page=Publications,
- *Federal Gender Equality Action Plan*, approved by the Cabinet in 1995,
- *Cabinet Directive on Law-making*, approved by the Cabinet in 1999;
- *Federal Identity Program.* http://www.tbs-sct.gc.ca/Pubs_pol/sipubs/TB_fip/siglist_e.html

This legal and policy framework raises a number of particular considerations, which are described below. They are grouped under three headings:

- Constitutional Issues and the Cabinet Support System;
- Proportionality of Sentences for Offences;
- Enforcement Powers.

Constitutional Issues and the Cabinet Support System

To ensure that constitutional issues (including the *Canadian Charter of Rights and Freedoms*) are properly taken into account in proposals for new programs or Acts, the Clerk of the Privy Council instituted the Cabinet Support System, with the support of the Department of Justice. The System requires all Memoranda to Cabinet (MCs) to include an analysis of the Charter and other constitutional implications of any policy or program proposal. The Clerk of the Privy Council wrote to all deputy ministers on June 21, 1991, for the purpose of implementing the System.

One of the reasons for the System is that successful Charter challenges in court can result in legislative provisions being struck down or program benefits being extended with significant financial costs to the Government. Another reason for the System is to avoid difficulties in federal-provincial relations. Also, experience has shown that litigation and other legal costs are frequently overlooked when officials estimate the costs of proposals.

The System requires that the Analysis section of each MC address:

- whether the proposal is likely to be subject to serious challenge on constitutional (including Charter) grounds and, if so,
  - the risk of successful challenge,
  - the impact of an adverse decision, and
  - the possible costs of litigation, to the extent that they can be estimated;
- whether the proposal raises division of powers issues that are likely to be sensitive in the current federal-provincial context; and
- whether the proposal would have a significant impact on other federal legislation, and if so, which ones.

If the constitutional implications will be minimal, a simple statement in the MC to the effect that they have been considered and been found to be insignificant would suffice.

If the legal implications are significant, a summary of the analysis should be included in the MC in the same way that analysis of any other significant factor is addressed. These significant implications should then be taken into account in formulating the recommendations to ministers.

If acceptance of a proposal would result in increased demands for legal services and require additional personnel or funding, this should also be included in the MC as a specifically identified part of the overall resource implications of the proposal.

Departmental legal advisers have primary responsibility for assisting their clients with the legal analysis. They are supported in their role by the Public Law and Central Agencies Portfolio of the Department of Justice, which has special expertise in constitutional issues and provides detailed assessments of these issues.

Although the Cabinet Support System is specifically concerned with MCs, its objectives apply throughout the policy-development process. Assessment of Charter implications for policy proposals neither begins nor ends with the MC process. Charter issues can be identified and risks mitigated well before an MC is drafted. Also, MCs are generally written at a high level of generality and principle. Drafting the fine details, such as administrative or regulatory arrangements, can result in new Charter issues being identified after an MC has been approved. Thus, assessment of constitutional and Charter risks must take place throughout the policy-development process.

Proportionality of sentences for offences

The principle of proportionality of sentences for offences requires the severity of punishments to reflect the relative seriousness of offences. No two offences of comparable seriousness should be punishable by maximum punishments of substantially different severity. Likewise, offences of manifestly disparate seriousness should not attract the same maximum punishment. An Act should provide for different punishments for breaches of different provisions, unless all breaches are of comparable seriousness.

Departments contemplating the enactment of new offences should consult with the Department of Justice, initially through their departmental legal advisers, as early as possible in the policy making process to ensure that the penalty provisions applicable to the offences are consistent with those governing similar conduct in other Acts.

In determining the maximum punishment appropriate for an offence, the Department of Justice considers the following criteria, which were approved by the Cabinet Committee on Human Resources, Social and Legal Affairs in 1991.

Harm:

- Does the offence involve risk of harm or actual harm?
- If so, is the harm to human life, health or safety? To property? To the environment?
- Is the harm short-term or long-term?
- Is it easily reparable?

The greater the harm or potential harm, the greater the need to deter the conduct giving rise to it and, therefore, the greater should be the punishment imposed on conviction.

Likelihood of detection:

- Is the misconduct difficult to detect?
- Is it detectable on routine inspection?

Since detection itself often acts as a deterrent to misconduct, an offence that is unlikely to be detected should be subject to greater punishment.

Profit motive:

- Does the misconduct result in cost savings or profits for the defendant?

Misconduct that has economic value for the defendant will be more difficult to deter than other types of conduct. If the punishment is to deter non-compliance, it must exceed the savings or profit that may be realized by non-compliance.

Aggravating factors:

In addition to these general criteria, consideration is given to aggravating factors that may increase the appropriate punishment in a given case. These are characteristics of the offence that cannot be known in advance; they will vary from case to case. However, the maximum punishment for a given offence should be assigned after considering the worst case in order to ensure that the sanction can have a deterrent effect on the violator and others. Mitigating factors can be taken into account by the sentencing court.

Aggravating factors are:

- previous convictions;
- failure to co-operate in the investigation or to abide by previous orders or warnings;
- harm caused to particularly vulnerable victims;
- duration of non-compliance;
- intention, knowledge or recklessness regarding non-compliance and its consequences;
- involvement of high-level management;
- actual costs saved or profit realized; and
- actual risk created or actual harm caused.

Enforcement Powers

When considering the enactment of new enforcement powers, consideration should be given to:

- *Guidelines for Granting Enforcement Powers under Federal Legislation*;
- *Principles for the Attribution of Federal Enforcement Powers.*

These guidelines and principles are reproduced below.

Consideration should also be given to developing a compliance and enforcement policy for the purpose of implementing any enforcement powers that may be granted.

Sponsoring departments should also consult with the Department of Justice, initially through their departmental legal services units, as early as possible in the policy making process to ensure that the enforcement powers are consistent with those governing similar conduct in other Acts.

Guidelines for Granting Enforcement Powers under Federal Legislation

The following guidelines for granting enforcement powers under federal legislation were approved by the former Interdepartmental Committee of Deputy Ministers Responsible for Federal Law Enforcement.

1. **Every federal statute should provide for and clearly define the powers required to ensure compliance with it.**

   An analysis of existing enforcement powers indicates that the number and nature of such powers are often inappropriate in terms of the defined mandate and required activities. In some instances the powers were conferred by a generalized reference to another statute, for example. "have for the purposes of this Act the powers of a police constable." Presumably the link is to the *Criminal Code* where the definition of peace officer includes a "police constable" with the status that definition implies.

   To the greatest extent possible, powers should be contained in the statute concerned. However, the attribution of powers by reference to another statute may be deemed appropriate for reasons such as avoiding duplication of voluminous material on a multiple basis (and the inherent problems in its subsequent amendment). To be clearly defined, attribution by reference must avoid wide—sweeping generalities and be done with a precise reference to the statute concerned, for example, "have for the purposes of this Act the power to issue an appearance notice in accordance with section 496 of the *Criminal Code.*" Powers will not be attributed in regulations; however, the activities derived from an attributed power may be set out in regulations.

The powers granted to enforcement officers should be sufficient to allow for the proper enforcement of the legislation for which the department has a mandate. Departmental officers and legal advisers must ensure that these powers are not excessive for the mandated task and do not arbitrarily or unreasonably interfere with individual rights and freedoms. These powers should be based on conditions or scenarios which have a reasonable probability of occurrence.

2. **Enforcement powers, including the terms and conditions on which they may be granted and exercised, must be compatible with the *Canadian Charter of Rights and Freedoms*. In the granting of enforcement powers and the activities which flow from those powers, there must be an overriding consideration and recognition of the degree to which the Charter restricts Government's right to impose limits on individual freedoms.**
3. **Peace officer status or a similar approach to providing a general category of powers should be granted only to officials whose statutory duties include the enforcement of the *Criminal Code*, the *Controlled Drugs and Substances Act* and the *Food and Drugs Act*.**

The intent of having an appointment such as "peace officer" is to provide the powers required for the maintenance of the public peace or local harmony. Originally, English criminal laws were intended to preserve the peace, and gave peace officers powers of arrest, detention and appearance.

The use of the term "peace officer" in legislation to describe either the status or powers of enforcement officers can cause confusion among officers concerning the extent of their powers and differing conceptions about the reach of their authority. This use of general powers could result in unwarranted and undesirable mandate expansion and overlap into areas in which another agency may have a more clearly established mandate and jurisdiction.

In the framing of the guideline, the original proposal was to limit the status of peace officer to those whose statutory duties relate to the enforcement of the "criminal law." The broad interpretation of that term would seem to take it beyond the tasks expected to be performed by a peace officer. For example, certain aspects of income tax, competition and consumer legislation may be viewed as criminal law.

Notwithstanding that statutes such as these may be regarded as "criminal law" and in many instances their violation has serious economic consequences for the nation, they are not directly related to the daily continuum of peace, good order and the expectation of quiet enjoyment. The enforcement of those matters can be effected by a law enforcement officer who has the necessary background of experience or professional qualification to identify, investigate and document a violation and ensure appropriate measures are undertaken. Peace officer status is not required to enforce those laws effectively. Enforcement officers may at their discretion seek support of a peace officer to minimize the potential for violations of the public peace during activities associated with the application of their own powers.

This guideline provides peace officer status only to those whose duty involves responsibility to enforce the *Criminal Code*, the *Controlled Drugs and Substances Act* and the *Food and Drugs Act*. These are considered to relate primarily to the public peace as described above.

In the granting of status as a peace officer or assigning peace officer powers, it will also be necessary to establish whether that status or those powers can be limited by the conditions for which they are required, for example, territorially, functionally or by class of person. Officers specifically appointed as peace officers in certain circumstances must exercise their powers within the limits mentioned in the legislation.

Reference is made to the judgment of the Supreme Court of British Columbia:

> There are several categories of persons defined by s. 2 [of the *Criminal Code*] as peace officers ... Customs and excise officers are police officers (this means that they have the powers of a peace officer) when performing their duties under the Customs Act or the *Excise Act*. Their powers as police officers are not limited territorially, but are restrained functionally to the exercise of such powers as may be necessary in the performance of duties in administering those Acts. The same applies to fishery officers under the Fisheries Act, and to the pilot in command of an aircraft. None of these is empowered by the definition section or otherwise to act as a police officer for the purposes of the *Criminal Code* except in relation to specified duties. Outside of those duties they are civilians. (See *R. v. Smith* (1982), 67 C.C.C. (2d) 418, 427, appeal dismissed (1983), 2 C.C.C. (3d) 250, B.C.C.A.)

All decisions which reflect that the status of peace officer is merited shall be further assessed to determine if they should be limited by functional conditions, class-of-persons conditions or territorial conditions.

4. **Every statute that provides for the granting of enforcement powers should set out appropriate review and redress procedures for persons affected by the exercise of the power provided in that statute.**

   Review and control procedures are imperative in the exercise of enforcement powers for the benefit of both those affected by the exercise of the powers in the statute as well as the officers required to undertake the activities and decisions associated with its enforcement. When powers are granted which affect the rights and freedoms of an individual in any way, ranging from arrest, entry to their premises, limiting their right to engage in either licensed or unlicensed activity or as a result of a decision not to act or sustain a complaint, the statute concerned must contain provisions to allow for a review or redress of the particular action which has been taken or is perceived to have been taken. This process of review or redress should be based on clearly established, well-understood accountability procedures related to internal supervisory control of enforcement actions of all officers as well as to third party review and investigation of the conduct of officers holding peace officer status or exercising peace officer powers in the enforcement of the statute. These procedures should as a minimum meet the FLEUR Guidelines Respecting Accountability Systems and Controls approved by the Committee of Deputy Ministers Responsible for Federal Law Enforcement dated May 1991.

5. **Every statute that provides enforcement powers should provide and clearly define the protection(s) that officers require to fulfil their enforcement responsibilities.**

   In recent reviews it has been noted that some departments and agencies seek peace officer status for their officers solely in the belief that this is the only means whereby the officers may have the required protection in the execution of their duties.

   Protections should not be conferred by a generalized reference to another statute in statements such as "have for the purposes of this Act the protections enjoyed by a peace officer."

   To the greatest extent possible, protections should be contained in the statute concerned; however, where reference is deemed appropriate for reasons such as avoiding duplication of voluminous material on a multiple basis (and the inherent problems in its subsequent amendment), the granting of protection by reference is acceptable. It must, however, avoid wide sweeping generalities and be done with a precise reference to the statute concerned. Protection must be confined to that which is fully justifiable in terms of what is necessary and useful in the protection of the enforcement officer in the performance of the enforcement activity.

Principles for the Attribution of Federal Enforcement Powers

The following principles for the attribution of federal enforcement powers have been approved by the Interdepartmental Committee of Senior Enforcement Officials and must be respected in relation to the attribution and exercise of federal enforcement powers.

The legal framework of power

1. Provisions of the law which grant enforcement powers must be clear and unambiguous.
2. Before any person is permitted to exercise enforcement powers, organizations must ensure they are fully aware of the legal responsibilities inherent in their appointment. The justification to utilize such power must be based on a statutory or common law authority.
3. The nature and degree of any enforcement powers conferred shall be no more than is necessary to achieve the mandated task and shall be based upon conditions and scenarios which have a reasonable probability of occurrence. The overall powers of a peace officer do not accrue as an automatic entitlement and are limited to the particular mandate. The attribution of powers shall comply with the Guidelines for the Granting of Enforcement Powers under Federal Legislation.

The vesting of power

4. The basis for the appointment of an officer shall be set out by a clear and precise statement in legislation. This shall be supplemented by the necessary policy statements, which indicate who has been or may be appointed in accordance with that statement. This may be by individual person, a readily identifiable class or a category of person employed on a particular task.
5. Appointments shall be made by way of an appointment document or credentials that clearly state the power granted and any limitations upon that power.
6. The public has a reasonable expectation of being able to readily determine the identity and powers of the appointed officers and the standards of service that they have a right to expect from them.

Training Requirements

7. The vesting of power will be contingent upon officers meeting minimum performance standards related to particular training objectives. This training will be based on the course training standards issued by the Interdepartmental Committee of Deputy Ministers Responsible for Regulatory Reform. The minimum training standards may be supplemented by additional training deemed appropriate by the organization concerned.
8. A minimum threshold of training must be established before status enforcement power/status is granted.
9. To maintain the required standard, each organization will conduct refresher training and ensure a continuing program based on the evolving issues related to the enforcement duties concerned.

Operational Considerations and Practices

10. The enforcement of the criminal law (as defined for the purposes of the Guidelines for the Granting of Enforcement Powers Under Federal Legislation) in the federal sphere is the responsibility of the RCMP except where otherwise specified.
11. Limitations on powers shall be consistent with the minimum requirement to achieve the mandate concerned. Presence in a particular territorial area or association with a particular function is not a sufficient reason for organizations that have limited powers to broaden their enforcement activities.
12. Enforcement activity beyond the applicable statutory limitations shall be confined to dealing with endorsed warrants, cases of special jurisdiction and "fresh pursuit" within Canada. In the case of the latter, the case must be turned over to the police of local jurisdiction at the earliest moment.
13. The investigation of international and organized crime is the prime jurisdiction of the RCMP. Interdepartmental cooperation, agreement or other assistance in the pursuit of such matters may be developed on a case-by-case basis or through the continuation of an existing agreement or on the basis of a new or revised agreement as the circumstances may dictate.

Intergovernmental agreements: extension or delegation of power

14. The acquisition of power from other levels of government must be based upon a reasonable requirement. That power must be required to achieve the mandate of the applicable federal statute. Such powers must be set out in an agreement that explicitly indicates that the responsibility for oversight mechanisms and

complaint resolution will remain with the federal organization to which the delegated officer belongs.

15. Delegation of any power to another level of government shall be by agreement that establishes the basic purpose for entering into the agreement. It must include the authority for such delegation and provisions for accountability and liability. The responsibility for oversight mechanisms and complaint resolution shall normally remain with the organization to which the delegated officer belongs.
16. Such agreements shall be managed in a manner that ensures standardization and coordination and facilitates the ready identification of persons granted such additional powers.

Review and redress

17. A review and redress process shall be established in all organizations whose officers possess enforcement powers. The process will be based on clearly established, well understood accountability procedures.

Developing Compliance and Enforcement Policies

In February 1992, Treasury Board amended the Government's *Regulatory Policy* http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&Page=Publications to place a new emphasis on regulatory enforcement. The reasons for this change in policy included the need:

- to ensure more effective management of scarce resources;
- to emphasize that compliance, not punishment, is the primary objective of enforcement activity under regulatory Acts; and
- to minimize the Government's increased exposure to damages for negligent enforcement under recent case law.

Departments administering regulatory Acts are now generally required to have formal compliance and enforcement policies. In addition, they must ensure that adequate resources are available to discharge their enforcement responsibilities and to ensure compliance, where the Act binds the Government. Compliance issues should form an integral part of the policy development process for any new Acts or regulations. If those issues are left to the drafting stage, or later, there may be no opportunity to incorporate modern compliance and enforcement measures, for example, to make formal provision for negotiated solutions to non-compliance or for administrative monetary penalties.

Published compliance and enforcement policies are usually preceded by the development of an (unpublished) compliance strategy that addresses anticipated compliance problems. The final, published compliance policy typically includes the following elements:

- an overview of the policy purpose of the Act or regulation;
- the orientation of the program;
- a formulation of the major rules under which compliance is sought;
- an outline of the range of techniques to be employed for encouraging voluntary compliance, for monitoring compliance and for dealing with non-compliance (possibly including a range of alternatives to prosecution); and
- the factors that enforcement officials take into account in exercising their statutory powers.

A guide entitled *A Strategic Approach to Developing Compliance and Enforcement Policies* http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&Page=Publications was prepared by the former Regulatory Compliance Project of the Department of Justice and published by Treasury Board to help departments meet this new responsibility.

The Administrative Law Section of the Department of Justice provides advice and assistance on compliance and enforcement issues arising throughout the legislative process.

Activities and Products for Policy Development and Approval

The following table identifies key steps of the process of policy development and approval and describes the associated activities and products. This table should be used with the MC Preparation Planning Calendar, which follows it and provides guidance on the timeframes that should be built into the process.

STEP	ACTIVITIES AND PRODUCTS
Contact Privy Council Office (Operations Branch) policy analyst responsible for your department	Consult early to define the proposal and discuss timing.
Contact your departmental Cabinet affairs unit	The departmental Cabinet affairs unit provides: • guidance on procedures and requirements within your department; • information on the requirements of the Privy Council Office; • a copy of *Memoranda to Cabinet: A Drafter's Guide* (http://www.pco-bcp.gc.ca/default.asp?Language=E&Page=publications&Sub=mc&Doc=mc_e.htm); • assistance in the policy development process. See also *Memoranda to Cabinet: A Drafter's Guide*, section E, the Good Governance Guidelines and the MC Preparation Planning Calendar.
Contact your departmental official responsible for parliamentary relations	Advise them that you are starting proposals for a memorandum to Cabinet that includes a proposal for a bill.
Contact Treasury Board Secretariat and Department of Finance policy analysts responsible for your department	Consult early to determine whether the proposal: • requires adjustment to existing expenditures; • requires new expenditures; • impacts on government contingent liabilities; • requires significant adjustments to existing programs; • impacts on Crown corporations; • has implications for official languages matters or labour-management relations.
Review the Good Governance Guidelines and the Preparing Bill-drafting Instructions for a Memorandum to Cabinet	Highlight matters to be considered as early as possible in the policy development process.
Draft Memorandum to Cabinet	For detailed advice, consult your Cabinet affairs unit and refer to *Memoranda to Cabinet: A Drafter's Guide*.

STEP	ACTIVITIES AND PRODUCTS
Prepare the drafting instructions	Prepared by a team of knowledgeable officials that includes a member of the departmental legal services unit (DLSU). This team will also provide detailed instructions at the bill-drafting stage. For detailed information, see the "Checklist for Preparing Bill-drafting Instructions for a Memorandum to Cabinet".
Seek departmental approvals (including Minister's approval) in accordance with departmental process	This step usually requires the preparation of briefing materials.
Have the draft MC translated in accordance with the departmental process	Give the translators the time and information they need to prepare an accurate translation. Have the translation reviewed by policy officials.
Organize interdepartmental meeting and circulate the draft MC to all departments concerned	Circulate to all departments whose Ministers sit on the policy committee that will consider the MC as well as to other departments involved in the proposal. Also include the PCO, TBS and Department of Finance analysts responsible for your department. Send out the draft MC in advance to allow departments sufficient time to digest the draft MC before interdepartmental meetings are held. See also *Memoranda to Cabinet: A Drafter's Guide*, section E.
Interdepartmental meetings chaired by senior departmental officials	Brief other departments on the details of the proposal and determine their positions. Include their positions in the MC, and resolve any issues.
Finalize the MC, including the translation, and send to Minister in accordance with departmental procedures	Provide Minister with appropriate briefing materials, including the results of interdepartmental consultations. Check that the MC conforms to PCO content and formatting requirements as specified in *Memoranda to Cabinet: A Drafter's Guide*.
Send two copies of the signed MC and electronic copies on diskette to the PCO Cabinet Papers Office	
Prepare presentation material for the Minister to use at Cabinet and Cabinet committee meetings	Presentation materials may be a slide deck, talking points, additional briefing material outlining anticipated positions of other ministers and Qs and As.
PCO Cabinet Papers Office distributes the MC to the other departments	
PCO analyst prepares briefing materials and briefs the Committee Chair	Briefing material is distributed only to the Committee Chair and PCO Ministers (the Prime Minister, the Deputy Prime Minister, the Leader of the Government in the House of Commons, the Leader of the Government in the Senate and the Minister of Intergovernmental Affairs).
Cabinet Policy Committee considers the MC and Drafting Instructions. PCO Cabinet Papers Office issues the Committee Report (CR)	Once the Cabinet Committee has decided on the proposal, a Committee Report is drafted by the Policy Committee Secretariat and issued by the Cabinet Papers Office. It is based on decisions made by the Committee in relation to the Ministerial Recommendations (MR) portion of the MC as well as any annexes to the MC (such as the drafting instructions).

STEP	ACTIVITIES AND PRODUCTS
	The Secretariat that drafts the CR may consult with the originating department and other interested departments to ensure that the wording of the CR accurately reflects the decisions of Ministers. See also *Memoranda to Cabinet: A Drafter's Guide*, section A.
Cabinet Approval of CR and drafting Instructions, followed by issuance of Record of Decision (RD) by PCO Cabinet Papers Office	The full Cabinet considers the CR and accompanying drafting instructions. The CR and the MC are the basic documents for Cabinet discussion. If the Cabinet confirms the CR, an RD is issued. See also *Memoranda to Cabinet: A Drafter's Guide*.

MC Preparation Planning Calendar

WEEKS BEFORE CABINET COMMITTEE (CC) MEETING	**MONDAY**	**TUESDAY**	**WEDNESDAY**	**THURSDAY**	**FRIDAY**
Six Week Minimum: Notification by Sponsoring Department(s)	Sponsoring Dept(s) alerts PCO that MC draft is forthcoming next week. Review of timelines and identification of horizontal linkages and Key Departments to be involved in MC preparation.				
Five Weeks: At least 72 hours to review MC prior to Key Departments' Meeting	First draft of MC distributed to Key Depts (to be shared informally for initial feedback).			Meeting with Key Depts to review first draft of MC.	
Four Weeks: At least 72 hours to review MC prior to Interdepartmental				MC second draft distributed to Interdepartmental community for review.	
Three Weeks: Interdepartmental		Interdepartmental meeting (minimum 21 days before CC meeting)			
Two Weeks: Final Drafting Stages	MC third draft to Interdepartmental Community for review.			If required, Key or Full Interdepartmental meeting.	
One Week: French and English submission of MC to PCO					

Chapter 2.3
Preparation and Cabinet Approval of Bills

Overview

This section supplements section 4 of the *Cabinet Directive on Law-making.* It provides information on the various steps related to the drafting of policy proposals into the legislative form of a bill and the Cabinet's approval of the bill for introduction in Parliament. It contains a description of the activities and products involved in this process.

In this chapter

- Summary of the Bill Preparation and Cabinet Approval Process
- Legislative Drafting Conventions
- Bill Preparation Process in Detail
- Activities and Products for Bill Preparation and Approval

Audience

- Officials involved in preparing a bill and seeking Cabinet approval for it.

Key messages

- Preparing a bill is a complex and critical step in the process and you should not underestimate the time and effort it requires.
- Bills are to be drafted in accordance with established conventions for legislative drafting.
- Program officials must be prepared to respond to the critical analysis of the draft bill by the Leader of the Government in the House of Commons.
- This stage of the process should also be used to prepare for the Parliamentary stage.

Summary of the Bill Preparation and Cabinet Approval Process

Preparation of bills

The bill preparation process begins with a Cabinet decision authorizing the drafting of a bill in accordance with written instructions approved by Cabinet.

The Legislation Section of the Department of Justice is responsible for drafting all Government bills. The Section is part of the Legislative Services Branch and consists of legislative drafters who work with other members of the Branch, including jurilinguists, legislative revisors, editors and computer services staff. It also includes drafters who work exclusively on fiscal bills for the Department of Finance.

Bills are co-drafted by pairs of drafters in the Legislation Section working simultaneously on English and French versions of the bill. Neither version is subordinated to the other. Co-drafting also reflects bijuralism, with each drafter usually having been trained in either common or civil law. One drafter has primary responsibility for communicating with instructing officers and managing administrative tasks. The sponsoring department may also ask other government departments to review and advise on the draft bill.

The process of preparing bills also involves officials in the departments from which the policy for the bills originate as well as legal counsel from the Department of Justice who work in the departmental legal services units. (see "Who does what in the Preparation of Government Bills" in this chapter). These officials and legal counsel are generally referred to as instructing officers. Their role is to supplement the drafting instructions approved by Cabinet by providing more detailed instructions to the drafters. Usually, many drafts of a bill are prepared, reviewed and discussed before a final draft is achieved.

Draft bills have traditionally been treated as Cabinet confidences. However, the *Cabinet Directive on Law-making* allows ministers to seek the agreement of Cabinet to consult on draft bills.

Consideration should be given to whether the bill has financial implications that will require a royal recommendation (for spending measures) or a ways and means motion (for taxation measures). These questions significantly affect legislative planning, for example, whether bills can be introduced first in the Senate. They should be considered as early as possible in the drafting process so that the drafters may advise the Legislation and House Planning/Counsel Secretariat (L&HP/C) of PCO. The Department of Finance must also be contacted for advice on the need for a ways and means motion.

As the bill is being drafted, the sponsoring department prepares the necessary briefing materials that will be needed both at the next step when the Leader of the Government in the House of Commons reviews the bill as well as later during the legislative process. These include:

- briefing books (also known as clause-by-clause books) for use by the minister or parliamentary secretary and by the members of the parliamentary committees that review the bill;
- draft statements for the minister, parliamentary secretary and government members during debate at the various stages of the parliamentary process;
- a succinct background paper that describes the bill;
- communications material.

In the final stages of drafting, the bill is printed by St-Joseph Print Group in preparation for the Cabinet approval process.

Cabinet approval of bills

Once a bill has been drafted in both official languages to the satisfaction of the sponsoring department, the sponsoring Minister, the Director of the Legislation Section and the Privy Council Office, it must be approved by Cabinet before being introduced in Parliament.

The Cabinet approval process has several stages:

- L&HP/C staff contact the sponsoring minister's Legislative Assistant to co-ordinate when the bill is to be introduced in Parliament.
- Once the bill printing process begins, copies of each print are sent directly to L&HP/C and to the sponsoring department.
- L&HP/C reviews the bill and consults the relevant PCO Policy Committee Secretariat to ensure that the bill respects the objectives approved by Cabinet.
- L&HP/C prepares a note for the Leader of the Government in the House of Commons.
- L&HP/C provides the bill and briefing note to the Leader of the Government in the House of Commons, who then conducts a line-by-line review of the bill and makes recommendations to Cabinet on whether it should be introduced in Parliament.
- If the bill is to be introduced, the Leader of the Government in the House of Commons goes to Cabinet to seek delegated authority to approve its introduction.

- After the Cabinet meeting, and before the introduction of the bill in Parliament, L&HP/C prepares and circulates a "Memorandum to Cabinet—Bill" (MC—Bill), along with the bill itself.
- After Cabinet approval, L&HP/C submits the bill in its final form to the Prime Minister or the Leader of the Government in the House of Commons for signature, along with the royal recommendation if the bill requires expenditure. The preparation of royal recommendations is the responsibility of L&HP/C.

Legislative Drafting Conventions

Overview

In a letter to Balzac in 1840, Stendhal said that he used to read two or three pages of the French Civil Code each morning in order to help him maintain a natural writing style. Probably few people today read federal Acts for that purpose. Yet Acts have a style of their own, which drafters believe can be justified in terms of the functions that Acts and regulations have in contemporary society.

The principal resources of legislative drafters are the resources of natural languages such as English and French, supplemented as appropriate by the artificial language of mathematical formulas.

The use made by legislative drafters of natural languages is structured by legislative drafting conventions. A legislative drafting convention bears the same relationship to a rule of grammar of a natural language as a constitutional convention bears to a rule of constitutional law. Two important conclusions can be derived from this analogy.

First, legislative drafting conventions guide legislative drafters in their selection of the various grammatically possible ways of giving legal effect to policy, just as constitutional conventions control the various legally possible ways of exercising a power. Thus, as a matter of constitutional law, the Queen or her representative in Canada, the Governor General, is free to appoint as Prime Minister whomever they wish. This discretion is controlled, however, by the constitutional convention that the Prime Minister must be the leader of a political party that can command the confidence of a majority of the House of Commons. And, as a matter of grammar, drafters are free to draft in the singular or the plural. This freedom is limited, however, by a convention favouring the use of the singular. (See "Reducing Vagueness or Ambiguity" in this chapter)

Secondly, legislative drafting conventions do not go against the rules of grammar, even as constitutional conventions do not go against the rules of constitutional law. There is no such thing as a special language for Acts of Parliament. Past attempts to alter the rules of grammar for the purposes of legislative drafting (the proviso is one example) suggest that the problems created for drafters by the ambiguity or vagueness of natural languages can be solved only by using the resources of those languages.

One widely recognized set of drafting conventions are those of the Uniform Law Conference of Canada. They can be found on the Internet at www.law.ualberta.ca/alri/ulc/acts/edraft.htm.

Reducing vagueness or ambiguity

Perhaps the most important function of legislative drafting conventions is to reduce the ambiguity or vagueness of a natural language such as English or French.

An instance of such a convention is the practice of drafting in the singular rather than the plural. Commentators on drafting point out that multiple modifiers often result in ambiguity when the modified noun is plural, citing examples like:

- "charitable and educational institutions;" and
- "persons who have attained the age of 65 years and are disabled."

Drafting in the singular compels drafters to determine whether the intended meaning is, for the first example,

- "a charitable and educational institution," or
- "a charitable or educational institution"

and, for the second example,

- "a person who has attained the age of 65 years and is disabled," or
- "a person who has attained the age of 65 years or is disabled."

(Note that "and" does not resolve the ambiguity in the plural.)

Some of the most important conventions for reducing ambiguity or vagueness relate to definitions and paragraphing.

Definitions

Some definitions in Acts of Parliament are just abbreviations. Common examples are definitions of "Minister," "Board" or "licence." Other definitions reduce ambiguity or vagueness by specifying which one of several usual meanings a word or expression is to have.

It is not the function of a definition in an Act of Parliament merely to reproduce the meaning of a word or expression in terms of the usage recorded in dictionaries, nor is the provision containing the definitions a sort of index or catalogue of frequently used words and expressions. Nor does the absence of a definition say anything about the importance of a word or expression in understanding the Act.

While a definition in an Act of Parliament compels the reader to read the defined word or expression in a particular way, there is a drafting convention prohibiting artificial or unnatural definitions, such as defining "apple" to include oranges. Artificial or unnatural definitions are an unnecessary obstacle to understanding an Act and often confuse drafters and policy makers alike.

Paragraphing

Paragraphing, in the context of Acts and regulations, refers to the practice of listing grammatically co-ordinate elements of a sentence in a series of indented, lettered "paragraphs." By convention, each paragraph in a series must be connected grammatically in the same way as every other paragraph in the series to the portion of the sentence before the series.

The convention resolves any ambiguity that may exist in the sentence by making clear the intended syntax of the sentence.

Paragraphing can be abused. This is the case, for example, when it is used to justify excessively long or syntactically involved sentences.

Relationship of drafting conventions to bilingualism

Drafting conventions sometimes differ between English and French. This is not surprising, since:

- ambiguity and vagueness, while common to all natural languages, arise in different ways in different languages; and
- different languages have different resources available for dealing with ambiguity and vagueness.

Even where the drafting conventions do not differ between English and French, their application to a particular provision may produce different results. This is sometimes the case, for example, with definitions. A word in one language might have only one meaning, so that there is no need to define it in an Act, while the equivalent word in the other language might have several meanings, so that it is necessary to specify by definition the intended meaning.

A common example of a word that is defined in one language only is the word "prescribed" in the English version, which is often defined to mean "prescribed by regulation." There is no adjective in English that corresponds to "regulation" in the sense of a certain kind of legal document. Drafters have, in effect, created such an adjective in English through the use of the definition of "prescribed." But in French, there is an adjective that corresponds to "règlement," namely "réglementaire." This adjective can be (and is) used in the French version without being defined.

Parliamentary procedure

Some legislative drafting conventions are based on parliamentary procedure (See Chapter 2.4 "Summary of the Parliamentary Process").

A parliamentary committee to which a bill is referred has the right to go through the bill clause by clause. A bill must consist of one or more numbered clauses so that parliamentarians can refer to and vote on particular provisions of the bill. It is also important to combine in a single clause only those elements needed to express a single concept. Combining more than one concept in a single clause, even with multiple subclauses, may make it more difficult for parliamentarians to debate and vote on the various concepts.

A motion for leave to introduce a bill in the House of Commons specifies the title of the bill. If the contents of the bill are not referred to in the title, the bill may subsequently be ruled out of order as having been irregularly introduced. The title of the bill must therefore cover the contents of the bill. This rule applies only to the parliamentary, or long, title of the bill. Any short title of the bill is just another clause, as far as Parliament is concerned.

Facilitating access to Acts and regulations

Some legislative drafting conventions facilitate access to Acts and regulations. Most users of Acts and regulations are not interested in reading a particular Act of Parliament or regulation through from beginning to end. It is important that Acts of Parliament and regulations be arranged so users can find the provisions that are relevant to them as easily as possible and so those provisions can be precisely identified.

The clauses of a bill are consecutively numbered from beginning to end so that each clause has a unique number. The numbering of the clauses does not, therefore, reflect the possible arrangement of the bill as a series of numbered parts or of any part as a series of numbered divisions.

Once the bill receives Royal Assent, the clauses become "sections" and the subclauses become "subsections."

The renumbering of provisions in an existing Act or regulation should be avoided because it can lead to confusion about references to those provisions: do they refer to the new number or the old one?

The provisions in a bill should be grouped together thematically and should flow logically. For example, if a licensing process is being created, the provisions that deal with licence applications should be set out first and the provisions dealing with the revocation or suspension of licences should be set out after.

It is important to organize a bill in a way that meets the needs of those who are most affected by it. For example, Acts are usually drafted so that statements of principle and basic rules are at the beginning. Enforcement provisions and regulation-making powers are usually placed at the end.

Facilitating the revision of Acts and regulations

Acts of Parliament and regulations are periodically "consolidated" and "revised." The revision process facilitates access to the law by getting rid of repealed provisions and adding new text.

Several legislative drafting conventions have been established to facilitate the statute revision process. A series of conventions requires drafters to place at the end of a bill provisions that will be omitted during the statute revision process. Placing them at the end reduces the renumbering of other provisions. Examples of provisions that, by convention, are placed at the end of a bill include:

- transitional or temporary provisions that relate to the bill as a whole;
- provisions repealing or amending other Acts of Parliament; and
- provisions dealing with the coming into force of the bill.

Another series of conventions relating to techniques of amendment facilitates the consolidation of Acts, whether through the statute revision process or through public or private publications of the text of one or more Acts "as amended." In order to facilitate consolidation, an amendment of one Act by another must be

- express and not implied—in other words, where it is known that the provisions of an Act are inconsistent with the provisions of a bill that is being prepared, the bill should expressly amend the Act, rather than leaving it for users and the courts to work out the inconsistency; and
- textual and not indirect—in other words, the bill should alter the text of the Act rather than providing that the Act is to be read or construed or applied or have effect in a certain manner or is deemed to operate in a certain manner, where that manner is not reflected in the text of the Act.

In addition, it is conventional to replace a provision, and not merely to insert or delete words in the provision, except where a single word or expression is being altered. This convention also facilitates consolidation because the drafter, aided by electronic databases of Acts of Parliament, rather than the user, produces the text of the provision as amended.

Bill Preparation Process in Detail

Who does what in the preparation of bills?

Departmental officials

Who are they?

A wide range of officials in the sponsoring department may be involved in the preparation and enactment of a bill. They are responsible for developing the policy that the bill expresses as law and are generally referred to as "program officials."

Knowledgeability

Program officials should be knowledgeable about the various aspects of the bill's subject matter, particularly in terms of the organization and operation of the Government. Their knowledge permits them to guide the drafters and channel difficult questions toward those who can answer them.

They should have ready access to senior officials in their department so that they can get answers or decisions about priorities and policies. Many questions necessarily arise during drafting, usually requiring a quick response.

Departmental legal advisers

Who are they?

Legal services to each department of the Government are provided by the Department of Justice through its Legal Operations Sector. Each department has a legal services unit staffed by legal advisers from this Sector.

What is their role?

Departmental legal advisers can explain how the legislative process works and what it requires. They can also provide information about the time it takes to draft a bill and ensure that the detailed drafting instructions are carefully formulated.

They can also explain what effect particular provisions may have and can help departmental officials correct provisions that are likely to present legal problems, particularly as regards the *Canadian Charter of Rights and Freedoms*.

Departmental legal advisers can also sensitize departmental officials to the possibility that particular proposals may limit guaranteed rights and freedoms and may have to be justified as reasonable limits under section 1 of the Charter. They can provide information on the kinds of evidence that may be needed to justify the resulting Act if it is ever challenged. They also help provide advice on the constitutional implications of proposed bills through the Cabinet support system. (See "Constitutional Issues and the Cabinet Support System" in Chapter 2.2)

Finally, departmental legal advisers are in a good position to remind their clients of the importance of putting together a team of instructing officers who are familiar with the legislative process. They will also stress the uniquely Canadian bilingual and bijural aspects that must be addressed to produce quality legislation. (See "Co-drafting" in this chapter).

Instructing officers

Who are they?

Generally speaking, the instructing officers are departmental legal advisers in the sponsoring department. Because a bill is a complex legal document, the legal advisers are well-suited to the task of giving drafting instructions and commenting on both language versions of the successive drafts of the bill. Departmental legal advisers are familiar with the subject matter of the bill as well as the legal difficulties that it may involve. They also appreciate the care required in preparing drafting instructions and commenting on both versions of each draft.

Alternatively, instructing officers may be program officials from the sponsoring department. However, they should contact the director of their legal services unit as early as possible to involve the director or, at the very least, ensure the involvement of departmental legal advisers. The legal advisers assigned to the bill should be experienced, have a sound understanding of the subject matter and be capable of communicating effectively in both official languages.

How many instructing officers should there be?

The number of officials giving instructions varies with the scope and complexity of the bill. However, as a general rule, the group of instructing officers should be small. The role of instructing officers is to distill policy decisions made in the sponsoring department into drafting instructions. If there is a large group of officials involved in a drafting meeting, much of the time may be spent discussing policy issues, rather than providing drafting instructions.

Occasionally, the subject matter of a bill involves more than one department. In these cases, instructing officers may come from several departments.

Why should instructing officers be bilingual?

Instructing officers must be capable of working in both official languages. The *Cabinet Directive on Law-making* requires draft legislation to be prepared in both official languages. It also requires sponsoring departments to ensure that they have the capability to:

- instruct in both languages;
- respond to questions about the proposed legislation from drafting officers in either language and relating to each legal system; and
- critically evaluate drafts in both languages.

Because bills are drafted in both official languages, drafting is much easier when all the principal participants have a sound understanding of both languages. The resulting bill will take less time to draft and its quality will be better assured.

Drafters

Drafting involves transforming Government policy into legislative form and style. Drafters in the Legislation Section of the Department of Justice are active partners with the instructing officers and are equally responsible for ensuring that the bill gives effect to the policy.

Drafters are also concerned with the coherence and consistency of federal Acts, as well as their fairness and the integrity of the legal system. They have an advisory role on many issues involving legal principles and policies (See "Particular Legal and Policy Considerations" in Chapter 2.2).

In this way, and by keeping in mind the effectiveness and efficiency of the entire legislative process, drafters provide valuable advice on a number of matters, such as:

- the time required to draft and print the bill;
- whether the proposed provisions are appropriate to achieve their objectives;
- whether there are gaps in the proposals that need to be filled with additional details or whether it is better to leave matters to be dealt with through general provisions;
- the appropriate form of the provisions;
- the inclusion of certain types of provisions in the bill.

Drafters also provide a sense of perspective. Because they are less involved in developing the underlying policy, they are better able to draft language that will be understood by members of Parliament, the public and the courts. Drafters are attuned to the need for clarity and certainty in legislation. This need is met by adhering to legislative drafting conventions as well as keeping in mind the rules and principles applied by the courts when they interpret legislation.

The legislative process sometimes demands quick responses to problems as they arise. Given the importance of the drafters' role in influencing policy, it is essential that they be consulted as soon as possible in such circumstances since it is more difficult to change the course of policy downstream in the process than to do so further upstream.

Jurilinguists

Jurilinguists in the Legislative Services Branch of the Department of Justice are specialists in legal language. Their primary role is to help drafters achieve the highest possible quality of language when drafting legislation. They keep a watchful eye on linguistic quality, focusing in particular on style, terminology and phraseology, to make certain that the linguistic quality is appropriate to legislative drafting and the subjects dealt with. They also ensure that the two official-language versions of legislation are parallel in meaning.

The first jurilinguists were employed in conjunction with the implementation of co-drafting. Their services were essential because the French version of federal Acts had been neglected for decades. Despite the constitutional rule that the French and English versions are equally authoritative, hasty translations from the English had peppered the French versions of federal legislation with peculiar anglicisms and clumsy constructions, which have been difficult to eradicate. The jurilinguists were given the mandate of ensuring that in future the French version of legislation would be true to that language and its idiom. More recently, with the growing impetus toward plain language, a need has emerged for similar support for the English version. In these circumstances the Jurilinguistic Services Unit was established in 1998. It consists of jurilinguists who work under the supervision of the Chief Jurilinguist and legislative counsel.

Jurilinguists keep abreast of the evolution of language in terms of both the law and legislation and the subjects dealt with, and, by carrying out the necessary research, they provide advice to drafters, either during the systematic revision of bills or in response to specific questions. The recommendations of jurilinguists are not binding on the drafters, who are ultimately responsible for their own files.

However, through the high calibre of their skills and the soundness of their advice, jurilinguists have been instrumental in bringing about a marked improvement in the quality of federal legislation over the years.

Legislative revisors and paralegals

Legislative revisors of the Legislative Revising Office in the Legislative Services Branch of the Department of Justice provide support to drafters by revising and editing draft legislation. The Office also prepares Acts for printing and maintains consolidated versions of all federal Acts and regulations.

Revising relates to the substance, form and language of legislation. In addition to checking for correct grammar and spelling, the legislative revisors check for clarity, consistency of language and the logical expression of ideas. They also verify the accuracy of cross-references, check historical precedents and citations, and ensure conformity with the rules and conventions governing the drafting and presentation of legislation. Revisors provide advice on appropriate wording of amending clauses, the format of schedules, the standard wording of particular expressions, the formulation of coming into force provisions, and other matters of a technical nature. Finally, they edit motions to amend bills and review reprints of bills amended by parliamentary committees.

In addition to performing revising functions, legislative paralegals in the Office also assist drafters by drafting consequential and related amendments to lengthy bills.

Another function carried out by the Office is overseeing the printing of government bills before they are introduced in Parliament and the printing of Acts after Royal Assent. Acts are published in the "Assented to" service, the *Canada Gazette* and in the Annual Statutes. The Office is also responsible for publishing the consolidation of the *Constitution Acts, 1967 to 1982* and the *Table of Public Statutes and Responsible Ministers*, an indispensable reference tool.

Finally, the Office maintains master copies of all federal Acts and regulations, including historical indexes of amendments. These master Acts and regulations are for internal use and are essential tools in the drafting of bills.

How are drafters assigned?

Once a legislative proposal has received Cabinet's approval, the Director of the Legislation Section assigns responsibility for drafting.

Each proposal is assigned to a team of two drafters: one responsible for the English version, the other for the French version. In exceptional cases, several teams of drafters may be assigned to draft very lengthy bills.

The choice of drafters depends on:

- the workload and experience of the drafters; and
- the complexity, subject matter and urgency of the bill.

Although specialization in particular fields is not encouraged, drafters are frequently assigned files on the basis of their experience in the same area or in a related area.

How are drafting timetables established?

Time constraints are among the most important matters to be considered in drafting a bill. Drafting timetables are based on the priorities established by the Leader of the Government in the House of Commons and approved by Cabinet.

A bill is much like a book: once the outline is out of the way, it still has to be written and published. The time required depends on its nature, the complexity of its subject matter, the quality of drafting instructions and comments from the instructing officers and the political requirements that the bill is called upon to answer. But, in every case, enough time is needed for drafting to produce an acceptable product. Without this time, the quality or effectiveness of the bill may be compromised.

The drafting phase ends with printing a series of page proofs of the bill. Printing is interspersed with revisions made by drafters, jurilinguists, editors and instructing officials. The time needed for these aspects also has to be taken into account. This is the quality control stage. It deals with not only the wording, but also the substance that the wording conveys. It is often only at this stage that central agencies (Privy Council Office, Treasury Board Secretariat, Department of Finance) can fully appreciate the proposed legislation.

It is no exaggeration to say that three weeks should be set aside for the printing stage. Printing in bill format is an effective way to focus attention on the details of the proposal.

Before promising the sponsoring minister to produce a bill within a particular time frame, instructing officers should discuss with the drafters the timetable for producing the bill. Once the instructing officers are attuned to the drafting considerations, they will be able to advise their minister realistically. It is crucial not to underestimate the time required to prepare a bill that is well-drafted and effective.

The following are some of the things that should be taken into consideration:

- the legislative priorities of the Government;
- the parliamentary calendar http://www.parl.gc.ca/information/about/process/house/calendar/calpre-e.htm;
- the schedule of the sponsoring minister;
- the workload of the drafters;
- the amount of drafting to be done by the drafters and the amount of review required by the sponsoring Department and central agencies;
- the amount of editing required and the comparison of the two versions;
- the time needed for printing the bill;
- the number of departments involved; and
- if Cabinet has agreed that the draft bill may be used for consultation, the amount of time needed for that consultation.

Questions about drafting priorities are determined by the Director of the Legislation Section and the Assistant Secretary to the Cabinet, Legislation and House Planning/Counsel Secretariat, taking into account the factors listed above. The approval of the Leader of the Government in the House of Commons is sought when necessary.

When does the drafting begin?

Ordinarily, drafting begins once a legislative proposal has been authorized by Cabinet through a Record of Decision. In exceptional circumstances, when it is necessary to meet the priorities of the Government, the Leader of the Government in the House of Commons may give approval for drafting to begin before the Cabinet authorization has been formally obtained. The sponsoring Department must contact the Assistant Secretary to the Cabinet, Legislation and House Planning/Counsel, who consults with the Director of the Legislation Section.

Co-drafting

What is co-drafting?

Co-drafting involves drafting the two versions of a bill together using a team of two drafters. One is responsible for the English version, while the other is responsible for the French. The Legislation Section uses the technique of co-drafting to ensure that each language version is properly drafted and reflects both the civil and common law systems.

History of co-drafting

Section 133 of the *Constitution Act, 1867* requires Acts to be enacted, printed and published in both official languages. The two versions must be enacted at the same time and are equally authoritative. If these requirements are not met, the Act is invalid.

It is also important to keep in mind that, when a federal Act is considered in court, the court interprets and applies both versions. This underscores even further the importance of ensuring that both versions reflect the intention of the Government.

In 1976, in response to severe criticism from the Commissioner of Official Languages, the Department established a committee to propose ways of ensuring the equality of French and English versions throughout the legislation preparation process and providing the Government with bills of the highest possible quality. The committee concluded that there was no magic solution and recommended co-drafting, an original drafting method that has since been adopted by other countries.

Co-drafting is now a well-established practice that has proven to be effective in drafting federal bills to reflect the equal status of both official languages enshrined in the *Official Languages Act* and later in the *Canadian Charter of Rights and Freedoms*. (See Chapter 1.2 "Legal Considerations").

What is the object of co-drafting?

The object of co-drafting is to produce two original and authentic versions through the close and constant cooperation of the two drafters. Each version should fully reflect the departmental instructions while respecting the nature of each language as well as Canada's twin legal systems (common law and civil law).

In co-drafting, neither version is a translation of the other. In contrast to the traditional approach of translation, one version is not unchangeable. The two drafters often prompt each other to change or improve their versions.

Both versions include the same headings, sections and subsections. Although they need not be parallel at the level of paragraphs or subparagraphs, an effort is made to arrive at a parallel structure in order to make it easier to read both versions together.

How does co-drafting work?

The main feature of co-drafting is that each bill is carefully thought out and drafted by two drafters, rather than just one. Both work together very closely from beginning to end to produce a better bill. One of them co-ordinates the various steps in drafting the bill, but this drafter does not assume sole responsibility.

How does the Record of Decision affect the drafting?

The drafting instructions in a Cabinet Record of Decision form the basis on which a Government bill is drafted. These instructions both determine and limit what the draft bill contains. The instructions should be general enough and flexible enough to permit the bill to be drafted to express the underlying policy but to leave room for developing the details of the legislative scheme. (See "Preparing Bill-drafting instructions for a Memorandum to Cabinet" in Chapter 2.2)

In the course of drafting a bill, problems sometimes arise that were not foreseen when Cabinet approved the drafting instructions. The relevant PCO policy secretariat and the Legislation and House Planning/Counsel Secretariat must be consulted to determine whether any changes require approval by Cabinet.

Approval is required if the changes have an impact on the policy approved by Cabinet or raise policy considerations not previously considered by Cabinet. The changes are subject to the same procedure as the initial proposal, namely, the submission of a Memorandum to Cabinet for consideration by the original policy committee of Cabinet and approval by the Cabinet.

Urgent major changes need not follow the full procedure, but may be approved by the Prime Minister and the Chair of the relevant policy committee of Cabinet together with other interested Ministers.

How are detailed drafting instructions given?

Who is responsible for giving detailed instructions to the drafters?

Instructing officers are responsible for providing drafters with the instructions they need to prepare a bill that fits within the framework set out in the Cabinet decision and that will be legally effective in implementing the proposals of the sponsoring department.

These detailed instructions are especially important because the drafting instructions in the Cabinet decision are usually quite general, regardless of how carefully they have been formulated. (See "Preparing Bill-drafting Instructions for a Memorandum to Cabinet" in Chapter 2.2)

What is their purpose?

In addition to being a necessary tool for drafters, the detailed instructions provide an opportunity for the sponsoring department to think through its proposals in order to produce a coherent set of provisions to implement the proposals.

What should they contain?

The instructions should contain complete and detailed information, as well as supporting documentation, about the following:

- the context of the desired provisions;
- the problems to be resolved and the solutions proposed;
- the particular objectives of the sponsoring department and the means by which they may be implemented;
- any regulations that may be needed;
- any amendments required to other Acts;
- any relevant legislative precedents;
- any legal difficulties;
- how contraventions of the Act will be dealt with; and
- any transitional provisions necessary to implement changes to an existing legislative scheme.

The quality of drafting instructions largely determines whether the drafting deadlines will be easily met, and whether the general quality of the resulting bill will be high. This is why it is important that instructions conform to a number of rules.

The instructions must be as complete as possible. They should reflect definite policies and decisions of the sponsoring department, rather than a range of options. They need not contain every detail involved in drafting the bill: details of lesser importance can be dealt with later in the course of examining, discussing and revising the drafts.

What form should they be in?

The instructions need not be in any particular form, as long as they are clear and concise.

When the bill is long and complex, the initial instructions should be in writing. However, instructions can also be orally transmitted at drafting meetings dealing with the intended meaning of particular provisions.

Should they be in the form of a bill?

In general, drafting instructions should not be in the form of a bill. Rather than making it easier to draft, this usually slows things down because the drafters have to interpret the text of the instructions to extract the policy objectives before they can begin to formulate their own drafts. The role of the instructing officials is to communicate these policy objectives to drafters clearly and precisely. The best way to accomplish this is through instructions expressed as simply as possible.

Occasionally, at the request of the drafters, it may be helpful to point to precedents in existing legislation to help them achieve a similar legislative effect. If the drafters clearly understand the policy objectives, reference to precedents can help them prepare a bill that fits into the body of federal legislation. However, precedents must be used with caution and can seldom be adopted without making adjustments so that they work effectively in the new legislative scheme.

How are drafts prepared, discussed and revised?

When are meetings held to discuss drafts?

Meetings are scheduled by the lead drafter after consultation with the second drafter to ensure her or his availability.

Who attends the meetings?

The meetings are attended by the drafters, the instructing officers and other officials from the sponsoring department as required.

It is of the utmost importance that both drafters actively participate at the meetings. The positions and points of view of the sponsoring department should be expressed and explained in as much detail as is required, as should the problems and situations that the bill is intended to deal with.

How to prepare for meetings

Before the first drafting meeting, the departmental officials and their legal advisers should prepare to brief the drafters on the background of the proposals and the Cabinet decision. Before meetings to discuss drafts, they should study both versions of the drafts to verify that each version reflects the policy developed by their department and approved by the Cabinet. They should also determine whether any legal or other problems are raised by either version.

The departmental review of the drafts must not be confined to one version on the assumption that the other will necessarily say the same thing. (See "Co-drafting" in this chapter). Both versions must be carefully examined by the sponsoring department to ensure that they accurately express the policy in each language.

As noted above, it is important to keep in mind that the courts interpret and apply both versions of federal legislation, and so it is crucial to ensure that both reflect the government's intentions.

Drafters encourage instructing officers to be critical when they review a draft of the bill. The goal is to put together, with the support of each participant, a bill that meets the Government's needs and is consistent with the policy and direction approved by Cabinet.

How are the meetings conducted?

Drafters pose any questions that they think will help them to understand the principles and objectives of the bill. The instructing officers explain the intention of the sponsoring department and allow the drafters to propose alternative solutions or solutions that are simpler or more compatible with existing federal Acts.

The meetings proceed in both official languages. The instructing officers provide their instructions and comments, as well as any supporting documentation, in both English and French. By the same token, the drafters usually ask questions and make comments in the language of their choice. The bilingual character of the meetings poses few problems when the instructing officers have been carefully chosen.

How are drafts prepared?

After each meeting, the drafters consult together on the best way to reflect the results of the meeting in their drafts. They also regularly consult the jurilinguists on terminology, syntax and other linguistic questions. Toward the end of the process, the drafters send their drafts to the jurilinguists as well as to the legislative revisors, who make suggestions for improving grammar, syntax, style, arrangement and coherence.

The drafters may also consult other sections or units of the Department of Justice in order to check particular points of law that arise when drafting.

The drafting shuttle

Depending on the urgency of the bill and the drafters' other priorities, they prepare a draft reflecting the consensus reached at the meeting.

Drafts are sent out in both languages at the same time for review by the instructing officers.

Other drafting meetings and drafts follow until those involved in the drafting process, and particularly the sponsoring Minister, are satisfied with the ultimate draft.

What security measures must be taken with draft bills?

A draft bill is a confidence of the Queen's Privy Council for Canada and is protected by section 69 of the *Access to Information Act* and section 39 of the *Canada Evidence Act*. As a general rule, draft bills are classified as secret and should be handled accordingly. They should not be shown to persons outside the public service without prior Cabinet authority, which may be sought in the Memorandum to Cabinet.

Bill summary

The sponsoring department must prepare for each bill (with minor exceptions such as *Appropriation* bills) a summary of its contents. The purpose of the summary is to help parliamentarians and members of the public understand the bill. The summary is printed on page 1a of the bill. If the bill is enacted, the summary is to be printed with the resulting Act.

The summary should be a clear, factual, non-partisan overview of the bill and its main purposes and provisions. It should not contain any reference to Cabinet decisions, Records of Decision or other Cabinet confidences.

The summary must be prepared in both English and French. Its length should be proportionate to the length of the bill and should not as a rule exceed two pages of single-spaced type in each language.

The sponsoring department should provide the summary (in electronic format, if possible) to the drafters at least one week before the bill is to be printed as a page proof.

Finally, the summary should be drafted so that no changes are needed when the note is published with the resulting Act. For example, verbs should be in the present indicative and the words "enactment" or "amendments" should be used, rather than "bill".

Explanatory notes

Explanatory notes provide details about particular provisions that are being amended by a bill. The Legislation Section of the Department of Justice is responsible for the preparation of these notes, which are published in bills at first reading to explain changes being made to existing Acts. These notes describe only the changes being made or quote the existing provisions of the Acts being amended.

Printing and distribution of draft bills

Introduction

This section deals with the printing of draft bills in final form for introduction in Parliament. It also discusses how and to whom the copies are distributed. This process is distinct from the production and distribution of computer printouts of earlier drafts by the drafters themselves. Printing occurs once the drafters and the instructing officers are satisfied that the text of a draft bill will not require major changes. The drafters arrange for printing instructions to be given to St-Joseph Print Group.

Requests for release of government bills

Draft government bills are classified "Secret". Consequently, the text or partial text of draft bills may be released only to members of the Legislation Section or the Legislation and House Planning/Counsel Secretariat (L&HP/C) (Privy Council Office) or to the instructing officer of the sponsoring department or a person designated by that officer. Requests from other persons for information about a Government draft bill not yet introduced in Parliament should be referred to the instructing officer.

Printing

Normally, a bill is printed and revised three times before it is scheduled for review by the Leader of the Government in the House of Commons to determine whether it should be approved for introduction. The first version is called the page proof. (If there is another version before the examination page proof, it is called the revised page proof.) The examination page proof is the version that goes to the Leader of the Government in the House of Commons for review. The next version is called the final page proof. (If the bill is printed again before introduction, it is called a revised final page proof.)

The examination page proof must be sent to L&HP/C no later than 10 days before the day on which the Leader of the Government in the House of Commons will be conducting the bill review. This rule may be varied only in exceptional circumstances. Once the Government House Leader has reviewed the bill, it may be printed in final page proof. No further changes may be made, except those requested by the Government House Leader.

Draft bills are printed by St-Joseph Print Group. Printing is requested by the Director of the Legislation Section by letter when the drafters of the bill, in consultation with the instructing officers, consider that it is ready for printing. The bill is printed from electronic data provided by the drafters to Informatics Services in the Legislative Services Branch of the Department of Justice. The data is coded and verified by Informatics Services before being transmitted to St-Joseph Print Group for photo-composition (the production of a camera-ready page) and the printing of proofs. For subsequent "press runs", changes to the data are input by Informatics Services on the basis of a manuscript prepared by the legislative revisors responsible for the bill on the instructions of the drafters. The data is then transmitted to St-Joseph Print Group for printing.

Special printing arrangements

If the sponsoring department requires extra copies, the instructing officers should indicate this to the drafters who will make sure the extra copies are ordered. The instructing officers should also advise the drafters if they wish to pick up their copies from the printer, for example when a bill is printed on Friday evening and they want to have copies Saturday morning.

Changes to printer's copy

A printer's copy is controlled by the Legislative Revising Office to ensure that all changes have been properly proofread and to provide an authoritative record of the changes so that there is no confusion about what the changes are.

After a draft bill has been printed, drafters make changes by writing them in hand on a copy of the bill or by preparing "strips". A strip is typed text that is inserted where the change is made and should be used whenever the changes are lengthy.

Successive printer's copies are kept on file in the Legislative Revising and Publishing Office and are not to be taken from that office without the knowledge of its members.

Minor, necessary technical changes to draft bills that are in final or revised final page proof form may be made if the signature copy (the copy that is to be tabled for introduction) has not been signed by the Government House Leader. The legislative revisors responsible for the bill communicate the changes to L&HP/C and to the House of Commons Legislative Services. This ensures that changes made on the signature copy are included in the printed copies for first reading.

Steps involved in each printing

The following describes in detail the steps usually involved in each printing and the time they may take. The times are given as a general model and may be shortened or lengthened in particular cases.

Page proof and revised page proof

Instructions for the printing request letter should be given before noon and all English and French WordPerfect documents of the draft bill and any table of contents and explanatory notes should be available to Informatics Services by noon. Draft bills are printed overnight and copies are available in the morning on the next working day.

Examination page proof

This printing should be regarded as the last chance for changes before introduction, other than those required as a result of the examination by the Leader of the Government in the House of Commons.

Instructions for the printing request letter should be given before noon. All corrections and changes, in English and French, should be given to the legislative revisors before 1 p.m. The legislative revisors process the corrections and changes and provide a printer's manuscript to Informatics Services. Copies will be available on the next working day after processing by Informatics Services. This print should be available no later than the Friday that is 11 days before the scheduled meeting of Cabinet at which the bill is to be considered. L&HP/C may waive this requirement in exceptional circumstances.

Final Page proof and revised final page proof(s)

This is the print of the bill that will be introduced in Parliament. Instructions for the print request letter should be given before noon and all corrections and changes, both English and French, should be given to the legislative revisors before 1:00 p.m. The legislative revisors process the corrections and changes and provide a printer's manuscript to Informatics Services. Copies will be available on the next working day after processing by Informatics Services.

Time required for printing

The time required to print a bill must be taken into consideration in determining when the bill will be ready for examination by the Leader of the Government in the House of Commons and delegation of authority for introduction.

The time required may vary depending on a number of factors:

- The timetable is based on average-length bills (50 pages or less); larger bills will likely require more time.
- Bills that have been significantly changed since the last print will require more time.
- Priorities will be set by the Director of the Legislation Section in consultation with L&HP/C if many bills are being processed and printed on the same day. This will likely delay the printing of some lower-priority bills.
- Bills that contain non-standard text (for example, schedules with tables, equations) usually require more time.

Sample calendar

The following sample calendar illustrates the time requirements. Each step in the printing process is represented by a letter. The meaning of each letter is explained after the calendar.

SUN	MON	TUE	WED	THU	FRI	SAT
1	2	3	4	5 A	6 B	7
8	9	10	11	12 C	13 D	14
15	16	17	18	19	20 E	21
22	23 F	24 G/H	25	26 I	27	28

A Page proof printing: The drafters notify the Director of the Legislation Section before noon of page proof printing and send all documents in French and English to Informatics Services by noon.

B The page proofs are delivered in the early morning to the Legislative Revising Office and distributed in the Legislation Section. The drafters, jurilinguists, legislative revisors and sponsoring department have five working days to review the page proofs.

C Examination page proof printing: The drafters notify the Director of the Legislation Section before noon of examination page proof printing, and all changes in French and English are given to the legislative revisors by 1 p.m. The legislative revisors prepare the printer's copy in the afternoon and Informatics Services processes the changes in the evening and sends the document to the printer.

D The examination page proofs are delivered in the early morning to PCO and to the Legislative Revising and Publishing Office for distribution in the Legislation Section.

E Final page proof printing: The drafters notify the Director of the Legislation Section before noon of final page proof printing, and all changes in French and English are given to the legislative revisors by 1 p.m. The legislative revisors prepare the printer's copy in the afternoon. Informatics Services process the changes in the evening and send the document to the printer. This print may be as late as the Monday before the Cabinet meeting, depending on when the Leader of the Government in the House of Commons examines the bill.

F The final page proofs are delivered in the early morning to PCO and to the Legislative Revising Office for distribution in the Legislation Section.

G Cabinet meeting.

H Notice of introduction must be published in the House of Commons Notice Paper 48 hours in advance(no notice is required for introduction in the Senate).

I Introduction in Parliament.

Printing alternative copies

Unless a bill is of extreme urgency or importance (such as strike legislation), only one version, drafted in accordance with the record of decision of Cabinet (the RD) should be printed in page proofs.

If additional alternative versions of the bill are desired, they should be in computer printout form only.

This practice will prevent the possibility of the wrong draft being introduced.

Distribution and number of copies of bills

The Privy Council Office and the Department of Justice each require a fixed number of copies of each print page. The sponsoring department receives 10 copies, unless it requests additional copies. Usual distribution:

- page proof and revised page proof (39 copies)
  - 20 for Justice
  - 9 for PCO
  - 10 for the sponsoring department
- examination page proof (48 copies)
  - 20 for Justice
  - 18 for PCO
  - 10 for the sponsoring department
- final page proof and revised final page proof (98 copies)
  - 20 for Justice
  - 66 for PCO
  - 10 for the sponsoring department
  - Two for the House of Commons Legislative Counsel (including bills that are introduced first in the Senate).

Bills are printed and distributed in accordance with the instructions in the print-request letter for each printing.

All copies for the sponsoring department and the Department of Justice (unless the print-request letter indicated that the sponsoring department will pick up its copies) are received in the Legislative Revising and Publishing Office, which is responsible for internal distribution. The first drafter provides the sponsoring department with its copies.

Printing costs

The department sponsoring the bill is responsible for all printing costs of a draft bill before its introduction in Parliament and for the cost of copies of the bill that it requires after it is introduced.

St-Joseph Print Group currently charges $8.50 for each camera-ready page it produces for a page proof, revised page proof or examination page proof and $10.50 per page for final page proofs. It then charges six cents for each page printed from the camera-ready copy. To estimate the cost of printing, use the following formula:

Cost of camera-ready pages: $8.50* X no. of printed pages

*$10.50 for final or revised final page proof

Cost of copies: six cents X no. of copies X no. of printed pages

= cost of camera-ready pages plus cost of copies

Thus, if a bill is 20 pages long and 32 copies are printed, St-Joseph Print Group will charge

(8.50 X 20) + (20 X .06 X 32) = $208.40 (for page proof, revised page proof or examination page proof)

(10.50 X 20) + (20 X .06 X 32) = $248.40 (for final page proof or revised final page proof).

Printing and reprinting of bills in Parliament

Once a bill is introduced, subsequent printings are arranged by the Office of the Legislative Counsel of the House of Commons or the Senate.

Obtaining copies after introduction

A limited number of copies are provided to Ministers and other Members of the House of Commons and Senators.

Bills are available on the Internet at http://www.parl.gc.ca/common/bills.asp?Language=E&Parl=37&Ses=1. Paper copies can be obtained through Canadian Government

Publishing (45 Sacré-Coeur Blvd., Hull, Québec K1A 0S9, (613) 956-4800) if they are ordered in advance. Copies may also be obtained from the Lowe-Martin Group (363 Coventry Road, Ottawa, Ontario K1K 2C5, (613) 741-0962). However, they must be ordered from Lowe-Martin before the bill is printed.

Copies are also available through stores that sell government publications.

Activities and Products for Bill Preparation and Approval

This table sets out the steps that a legislative project team must follow to prepare a bill and have it submitted for Cabinet approval. Key activities and products are indicated for each step.

Throughout this stage it is essential for instructing officers to keep in touch with the Legislation and House Planning/Counsel Secretariat (L&HP/C) of the Privy Council Office about their progress in preparing the bill and when it will be ready for review by the Leader of the Government in the House of Commons.

STEP	ACTIVITIES AND PRODUCTS
Assignment of drafters to draft the bill	The Director of the Legislation Section of the Department of Justice assigns drafters to draft each language version of the bill once Cabinet approves the Memorandum to Cabinet. Drafters may be assigned before MC approval if the Leader of the Government in the House of Commons so authorizes. This authorization is granted on the advice of the Assistant Secretary to the Cabinet (Legislation and House Planning/Counsel), who should be contacted first about this authorization and who will in turn consult the Director of the Legislation Section.
Establish a critical path for drafting and introduction in Parliament	Within the framework of the Government's legislative agenda, the instructing officers and the drafters, in consultation with the L&HP/C, agree on a timetable for drafting and a target date for having the draft bill ready for Cabinet consideration. The timetable may be revised from time to time.
Detailed drafting instructions	The drafting instructions are contained in the Cabinet Record of Decision approving the drafting of the bill. The details of these instructions are fleshed out by the instructing officers either in writing or orally at meetings with the drafters.
Financial aspects	The financial aspects of a bill should be taken into account as early as possible in the drafting process in order to determine whether a royal recommendation (for spending provisions) or a ways and means motion (for taxing provisions) is needed. This will allow the drafters to advise L&HP/C on these matters. The Department of Finance must also be consulted if a ways and means motion is needed.
Preparation, review and revision of drafts	Drafters prepare drafts for review by the instructing officers and other departmental officials concerned. Drafters advise L&HP/C on the status of drafting through the Legislation Section's weekly status report on bills. The Legislation Section also advises L&HP/C on the need for a royal recommendation through the weekly status report on bills.
Jurilinguistic review	Once the main elements of a bill are established, it is submitted for review by jurilinguists with respect to the terminology, sentence structure, style and organization of ideas.
Drafts edited	Once the drafting is nearing completion, the draft is reviewed by legislative revisors in the Legislative Services Branch.
Comparison both versions of draft	Once the drafting is nearing completion, both versions of the draft are reviewed by a jurilinguist in the Legislative Services Branch to ensure they are consistent with one another.
Consultation	The sponsoring department may wish to consult on drafts with other interested departments. Consultation may also take place with persons outside the

Step	**Activities and Products**
	Government, if Cabinet has authorized the consultation.
Finalization of draft before printing	The Director of the Legislation Section, on the advice of the drafters, determines when the drafting of the bill is sufficiently advanced for it to be printed.
Draft to L&HP/C	Instructing officers provide L&HP/C with a copy of the draft bill before it is printed in page proof form.
Printing draft bill	Draft bills are ordinarily printed three times (page proof, examination page proof and final page proof). St-Joseph Print Group prints the bill, generally overnight. Instructing officers, drafters, legislative revisors and PCO review the copies. Instructing officers provide further instructions.
Preparation of bill-summary	Departmental program officials prepare a short bilingual summary of the bill. The drafters review the summary and incorporate it into the printed bill.
Advise L&HP/C on need for a royal recom-mendation	When a draft bill is sent for final page proofs, the Director of the Legislation Section sends L&HP/C a letter indicating whether a royal recommendation is required and, if so, the particular provisions that attract the requirement.
Internal departmental approval of draft bill	Approvals are required before the draft bill is sent to L&HP/C for Cabinet approval. The draft bill and the legislative plan, which includes a communications strategy, are sent to the Minister as a package for approval. Speeches, press releases and backgrounders are prepared. Once the Minister approves the bill and the plan, the Minister's staff notify L&HP/C.
Preparation of information packages	Legislative project team prepares information packages for the Minister, Parliamentary Secretary and the sponsoring Senator. Copies are also forwarded to the Deputy Minister and Associate DM. Packages contain: • Backgrounder • Clause by clause explanatory notes • Qs and As • Talking points (if necessary) • a description of the consultation process • an outline of the regulations, if any • letters of support and other material such as press releases. A version of the information package is also prepared for Members of the House of Commons, Senators, Opposition critics and committee members. These packages contain all the documents that are in the briefing book with the exception of any confidential material.
Preparation of speeches and press releases	This involves a speech meeting with the speechwriter, departmental communications branch, program officials, parliamentary relations officials and the Minister's office. A meeting usually takes place after the planning session on the legislation plan. Program officials should bring copies of any background material that would be

STEP	ACTIVITIES AND PRODUCTS
	useful to the speechwriter. The number and length of speeches required are determined by the Minister's Office and depend on the legislation in question. Press releases are normally required at introduction and at Royal Assent.
Bill review by the Leader of the Government in the House	The Leader of the Government in the House of Commons (LGHC) conducts a review of the bill before seeking delegated authority from Cabinet to approve its introduction. Examination page proofs must be sent to L&HP/C in both languages at least 10 days before the bill review. Senior departmental officials are required to present the bill to the LGHC clause by clause and they should be prepared to explain each clause and answer any questions, including technical or drafting questions. They also explain the projected time frame for passage and the reasons for it (for example, costs, implementation date, etc.).
Cabinet approval (delegated authority)	Depending on the outcome of the bill review, the LGHC may seek Cabinet authority to approve introduction of the bill.

Chapter 2.4
Parliamentary Process

Overview

This section supplements section 5 of the "Cabinet Directive on Law-making." It follows the progress of a bill from its introduction in Parliament through to Royal Assent and describes the supporting materials that have to be ready at each stage.

Additional information about the parliamentary process can be found in:

- *Précis of Procedure*, published by the House of Commons and available on the Internet at http://www.parl.gc.ca/information/about/process/house/precis/titpg-e.htm
- *Rules of the Senate*, published by the Senate and available on the Internet at http://www.parl.gc.ca/information/about/process/senate/rules-e/senrules-e.htm

In this Chapter

- Summary of the Parliamentary Process
- Certification of Government Bills
- Activities and Products in the Parliamentary Process

Audience

- Officials responsible for assisting in the progress of the bill through the House of Commons and the Senate.
- Those who prepare briefing materials for use in Parliament or attend briefing sessions.

Key Messages

- Once a bill has been printed and is submitted to Parliament for consideration, there is still a significant amount of work for departmental officials to do—briefing materials, speaking notes, news releases, advice on proposed amendments, etc.
- Preparation of some of these products can be completed while the bill was being drafted.
- The time it takes to complete these tasks should be factored into the project planning schedule.

Summary of the Parliamentary Process

A bill must pass through a series of parliamentary stages before it becomes law. These stages begin with the introduction of the bill in either the Senate or the House of Commons. Once introduced, the bill is studied, debated and adopted in that House. It is then introduced in the other House, where it is again studied, debated, and adopted. The final stage is Royal Assent.

The House of Commons and Senate sit for approximately 26 weeks or 130 days during a calendar year. However, some of these days are allotted to consideration of the Estimates, the Address in Reply to the Speech from the Throne, and budget debates. This leaves approximately 100 days to consider Government bills.

The timing of each parliamentary stage is determined by the Leader of the Government in the House of Commons in consultation with the sponsoring Minister. The main stages in each House are:

- Introduction and First Reading
- Second Reading
- Committee Study
- Report Stage
- Third Reading.

Passage in the House of Commons

Most Government bills are first introduced in the House of Commons. However, a Government bill may be first introduced in the Senate if it does not impose or increase taxes and does not provide for the spending of public money.

Introduction

To introduce a public bill in the House of Commons, a Minister must give 48 hours written notice. The Legislation and House Planning/Counsel/Counsel Secretariat (L&HP/C) with the office of the Leader of the Government in the House of Commons arranges for this notice to be given by including the title of the bill in the House of Commons Order Paper. Introduction by a Government Minister then takes place automatically without debate. The Minister introducing the bill does not speak at this time.

Royal Recommendation

Bills that involve expenditure of public money must be introduced first in the House of Commons (rather than the Senate) and they must be “recommended” by the Crown before they are introduced. The L&HP/C staff obtain a royal recommendation from the Governor General or a Deputy of the Governor General (a judge of the Supreme Court of Canada).

When a royal recommendation is required for a bill, it is communicated to the House of Commons before the bill is introduced and is included on the Order Paper. After the bill has received first reading, the recommendation is printed in The Journals and included on Page 1a of the First Reading Print. The recommendation is worded as follows:

> His or Her Excellency the Governor General recommends to the House of Commons the appropriation of public revenue under the circumstances, in the manner and for the purposes set out in a measure entitled "(long title of the bill)."

Briefings

Government bills are not made public until introduced and, therefore, briefings of parliamentarians and the media on bills follow introduction. However, pre-introduction briefings of parliamentarians and the media may be appropriate in exceptional cases, such as with particularly important or complex legislation.

If a media briefing occurs before the introduction of a bill, effective measures (such as an embargo or a lock-up) must be taken to ensure the protection of the information until the time of introduction and a similar advance briefing must be offered to parliamentarians. The briefing of parliamentarians may take place before or at the same time as the media briefing, but not after. Any pre-introduction briefing of parliamentarians must be offered both to Government and opposition members.

Immediately after introduction, a sufficient number of copies of the bill should be made available for parliamentarians and the media. These principles also apply if a Government bill is first introduced in the Senate.

Ways and Means Motion

A ways and means motion must be adopted by the House of Commons before the introduction of a bill that would impose or increase taxes. Like expenditure bills, these bills must also be introduced first in the House of Commons (rather than the Senate).

First Reading

First reading follows immediately after introduction and is also adopted automatically without debate. Following that, the Speaker asks:

> When shall the bill be read a second time?

The response to which is:

> At the next sitting of the House.

This formality allows the bill to be placed on the Order Paper for second reading.

Second Reading

Second reading is the first substantive stage in Parliament's consideration of a bill. The principle and object of the bill are debated and either accepted or rejected. The clauses of the bill are not discussed in detail at this stage.

Three types of amendments may be proposed to the motion to read the bill a second time:

- the six months' hoist: "That Bill [number and title] be not now read a second time but that it be read a second time this day six months hence";
- the reasoned amendment, which expresses specific reasons for opposing second reading;
- an amendment to refer the subject matter to a committee before the principle of the bill is approved.

Committee Stage

The *Standing Orders of the House of Commons* provide that a bill be read twice and then referred to a committee. Bills based on supply motions are referred to a committee of the whole; other types of bills are referred to a standing, special or legislative committee specified in the motion for second reading. The committee then considers the bill clause by clause. Amendments to the text of the bill are considered at this stage.

Before beginning clause-by-clause study, the committee usually invites the sponsoring Minister to appear before it. The committee may also hear witnesses, including departmental officials, on technical matters. Amendments in committee must be in keeping with the principle of the bill as agreed to at second reading in the House. Generally, the committee may make amendments to any part of a bill (for example, the title, preamble, clauses and schedules). Clauses and schedules may be omitted and new ones added. However, amendments requiring a royal recommendation must be done at report stage. After a committee has completed its consideration of a bill, it orders that the bill be reported to the House.

Report Stage

The Standing Orders require that every bill examined and reported by a committee be considered by the House at report stage. Except for those bills considered in Committee of the Whole, report stage cannot begin sooner than the second sitting day after the bill has been reported unless the House orders otherwise. Motions in amendment at this stage must be filed not later than the sitting day prior to the beginning of consideration and placed on the Notice Paper. Those with financial implications require a Royal Recommendation, which must also comply with this notice requirement. Ministers of the Crown may, without notice, propose amendments that address only the form of government bills. Once report stage has begun, no further motions in amendment may be introduced.

The Speaker may select and group proposed amendments for debate and may also rule on whether each motion should be voted on separately or as part of a group. This decision is made at the beginning of report stage, at which time the Speaker may also indicate the amendments he or she considers procedurally dubious. Normally, the Speaker will not select for debate at report stage any motion in amendment that was introduced in similar form and rejected previously at the committee stage.

It should be noted that in 2001 the House of Commons and its Speaker placed new and stricter limits on the acceptability of report stage amendments. As a result of procedural changes, the Speaker is also unlikely to select amendments, including those proposed by the Government that could have been proposed at the committee stage.

When deliberations at report stage are concluded, a motion is moved that the bill (with any amendments) be concurred in. The question is put immediately, without amendment or debate. If no amendments are put down for consideration at report stage, this stage becomes more of a formality, and report and third reading stages may then occur on the same day.

Alternative Procedure—Committee Stage Before Second Reading

Tradition dictates that the adoption of the motion for second reading of a bill defines the principle contained in the bill and therefore limits the scope of the amendments that may be made to the bill in committee and at report stage. By referring a bill to committee before the principle has been adopted by the House, the House can give itself more flexibility to review and fine-tune the legislation. In recognition of this, some of the new Standing Orders adopted in February 1994 defined procedures by which the House could refer a bill to a committee for detailed examination before second reading.

A Minister wishing to have a Government bill referred to a committee before second reading will propose a motion that the bill be referred to a committee. This is done immediately after the reading of the Order of the Day for second reading and after notifying representatives of the opposition parties. Under the rules of the House, there may be up to three hours of debate on the motion. The motion is not amendable and there is a specific speaking order for Members of the different parties. At the end of three hours, or when no other Member rises to speak, the Speaker will put the question to the House. If the motion is adopted, the bill will be referred to committee for study.

Generally speaking, the committee will conduct its clause-by-clause examination of the bill subject to the same rules and procedures governing the committee study of bills after second reading. However, the scope of amendments that can be made to the bill is much wider. At the conclusion of its study, the committee will report the bill to the House, with or without amendments. The report stage of this bill cannot be taken up until three sitting days after the bill is reported to the House.

When the bill is reported back to the House, what follows is essentially a combined report and second reading stage. The procedures for dealing with amendments are the same as those for report stage after second reading. However, while Members of the House can offer amendments to the legislation, notice of amendments to be proposed at report stage must be given in writing two sitting days before the bill is to be taken up. When the bill has been concurred in and read a second time, it will be set down for third reading and passage at the next sitting of the House.

Third Reading

At third reading the House decides whether to adopt the bill.

The same types of amendments as may be proposed at second reading may also be proposed at third reading; that is, the six months' hoist and the reasoned amendment.

In addition, an amendment may be proposed to refer the bill back to committee to be further amended in a specific area or to reconsider a certain clause or clauses.

Passage by the Senate

After a bill has been passed by the House of Commons, a message is sent to the Senate requesting that the bill be passed by the Upper Chamber, where procedures for passage of a bill are similar to those in the House. However, there are some important differences:

- notice of introduction is not required for bills;
- bills are only referred to committee after second reading;
- bills can be amended at third reading.

If the Senate passes the bill without any amendment, a message to that effect is sent to inform the House of Commons.

If there are amendments to the bill, the Senate communicates this to the House by message. In the House, a 24 hour written notice is required for any motion respecting Senate amendments to a bill. Consideration of Senate amendments appears on the Orders of the Day and proceeds under a motion moved by the sponsor of the bill, as follows: "That the amendments made by the Senate to Bill ..., be now read a second time and concurred in". If the House agrees to the Senate amendments, a message is sent informing the Senate accordingly, and the bill is returned to the Senate for Royal Assent.

If the House does not agree to the Senate amendments, it adopts a motion stating the reasons for its disagreement, which it communicates to the Senate. If the Senate wishes the amendments to stand nonetheless, it sends a message to this effect to the House, which then accepts or rejects them. If it decides to reject them, the House may adopt a motion requesting a conference between the two Houses, where their respective representatives attempt to resolve the impasse.

Royal Assent

The *Constitution Act, 1867* states that the approval of the Crown, signified by Royal Assent, is required for any bill to become law after passage by both Houses. Royal Assent brings together the three constituent parts of Parliament: the Crown (represented by the Governor General), the Senate, and the House of Commons. Although the Governor General in person may give Royal Assent to major pieces of legislation and at prorogation, a Deputy of the Governor General in the person of a Judge of the Supreme Court may represent the Governor General at other times.

The timing of Royal Assent is arranged by the Leader of the Government in the House of Commons in consultation with the Leader of the Government in the Senate. Royal Assent is generally held before an adjournment or prorogation or when a bill of particular urgency requires assent.

In the ceremony for Royal Assent the Senate Clerk, officially styled Clerk of the Parliaments, reads the short titles of the bill or bills to be approved. The formula of assent is then pronounced by the Senate Clerk on behalf of the Crown's representative. If supply bills are to receive assent, the Commons' Speaker addresses the Crown's representative according to an established formula and presents a copy of each bill to the Senate Clerk Assistant. The Clerk of the Parliaments, in the name of the Sovereign, then thanks the House for its loyalty and benevolence and announces the Royal Assent. At the conclusion of the ceremony, the Speaker returns to the House and reports what has just occurred. The proceeding usually takes 15 or 20 minutes, after which the House resumes the business interrupted by the arrival of the Usher of the Senate or adjourns the sitting.

Other Procedures

The previous discussion has described the traditional parliamentary process and one of its variants. (See in this chapter *Alternative Procedure—Committee stage Before Second Reading*). However, a number of other methods have been developed for the parliamentary consideration of bills. Some have been prompted by the desire to consult members of Parliament and allow them to have effective input into legislative proposals. Another is designed to meet a need to correct minor problems in the statute book.

The choice of process depends not only on the type and scope of the legislative proposals, but also on the Government's strategy. The sponsoring department should examine the various options and consult L&HP/C or, in the case of corrections to minor problems, the Legislation Section of the Department of Justice.

The following is a brief description of the other procedures that may be used.

Tabling Draft Bills

The Government may prepare a draft bill for tabling by the sponsoring Minister and referral to a committee for study. The draft bill is not formally introduced or given first reading. Because of this, the committee can study the draft and make detailed recommendations for its revision without procedural constraints.

The committee's report can then be taken into account by the Government when it finalizes the bill and tables it for first reading as a Government bill.

Committee to Bring in a Bill

The changes to the Standing Orders in 1994 provide that a committee can be instructed to recommend the principles, scope and general provisions for a bill or actually draft a bill. If the House of Commons concurs in the committee's report, that concurrence becomes an order to bring in a bill based on the report.

The Government then introduces the bill. There is no debate at second reading, but the bill goes directly to committee for study. This procedure might be suitable where consensus is probable and MPs are particularly interested in the subject matter

Miscellaneous Statute Law Amendment Acts

Miscellaneous Statute Law Amendment Acts are subject to an accelerated enactment process involving committee study of legislative proposals before they are introduced as a bill (see above "Miscellaneous Statute Law Amendments" in Chapter 2.1).

Certification of Government Bills

The Minister of Justice is required to examine every bill introduced in or presented to the House of Commons by a Minister of the Crown. This requirement arises from section 3 of the *Canadian Bill of Rights* and section 4.1 of the *Department of Justice Act*. The purpose of the examination is to determine whether any provision of the bill is inconsistent with the purposes or provisions of the *Canadian Bill of Rights* or the *Canadian Charter of Rights and Freedoms*. The Minister of Justice is required to report any inconsistency to the House of Commons at the first convenient opportunity.

The Clerk of the House of Commons sends the Minister of Justice two copies of each bill. A member of the Legislation Section of the Department of Justice examines the bill and the Chief Legislative Counsel signs the certificate stating that it has been examined on behalf of the Deputy Minister of Justice.

If a bill is considered to be inconsistent with the *Canadian Bill of Rights* or the *Canadian Charter of Rights and Freedoms*, the Deputy Minister and Minister of Justice are advised immediately for the purpose of making the required report to the House of Commons.

Activities and Products in the Parliamentary Process

The following table sets out the steps that a legislative project team must follow when a bill is going through the parliamentary process. Key activities and products are indicated for each step.

In some cases, responsibility for a particular product varies depending on how the sponsoring department is organized. In these cases, the product is identified without an indication of who is responsible for it.

You should also consult the parliamentary calendar to determine when Parliament is in session: http://www.parl.gc.ca/information/about/process/house/calendar/calpre-e.htm.

A number of supporting documents are needed during this stage. They should be prepared well in advance, ideally before this stage begins. They include the following:

Legislative Support Materials

- clause-by-clause analysis;
- issues papers;
- general Qs and As;
- Minister's speeches in the House for second reading, report stage and third reading;
- Minister's statements before committees of the House and the Senate;
- caucus and opposition briefing decks;
- speeches to be used by supporting government MPs.
- speeches to be used by supporting government senators;

Public and Media Relations Materials

- highlights sheets,
- backgrounders,
- Minister's press conference remarks,
- media information kits,
- press releases,
- any other necessary communications material.

In the House of Commons

Notice, Introduction, and First Reading

STEP	ACTIVITIES AND PRODUCTS
Notice of introduction	Discuss with Legislation and House Planning/Counsel Secretariat (L&HP/C) of the Privy Council Office the timing of the notice for introduction. L&HP/C makes arrangements for the notice to be given. Not needed for bills requiring a ways and means motion.
Ways and means motion	Needed for bills that impose or increase taxes. L&HP/C and the Department of Finance make arrangements for the motion. If a bill requires a ways and means motion, it cannot be introduced until the motion is adopted. A bill requiring a ways and means motion must originate in the House of Commons. It cannot originate in the Senate.
Royal Recommendation	A royal recommendation is required if the bill contains any provisions requiring the expenditure of public money. L&HP/C makes arrangements for the Governor General to give any required recommendation. A bill that requires a royal recommendation must originate in the House of Commons; it cannot originate in the Senate.
Pre-introduction briefings	Pre-introduction briefings may be given in exceptional cases. If a media briefing occurs before the introduction of a bill, effective measures must be taken to ensure the protection of the information until the time of introduction. In addition, a similar advance briefing must be offered to parliamentarians. Any advance briefing of parliamentarians must be offered to Government and opposition members.
Introduction and First Reading	There is no debate or vote at this point. The sponsoring Minister must be in the House of Commons at this time. If the sponsoring Minister is unable to be present, another Minister may introduce the bill on the Minister's behalf. If applicable, regional office and program officials keep client groups advised of all activities and progress.
Bill summary for lobby	A one- or two-page summary is made available in both official languages for use by those wishing to join the debate. Copies of the bill should also be provided by the Minister's office to the Government and opposition lobbies at the time of introduction.
Information packages and briefings for opposition critics and other parliamentarians	Immediately after introduction and first reading, the Minister's office sends the information packages to the opposition critics and any other Members of Parliament identified by the Minister's office. The Minister or his/her Legislative Assistant offers briefings to the Opposition critics. Briefings are conducted by members of the legislative project team. All material for distribution must be in both official languages.
Referral to committee	A government bill may be referred to a committee before second reading. A decision to do this will have been discussed by the sponsoring Minister and the Leader of the Government in the House of Commons earlier in the process when the strategy for the bill is being established.

STEP	**ACTIVITIES AND PRODUCTS**
Certification of bill	Department of Justice examines the bill to determine whether it is inconsistent with the *Canadian Charter of Rights and Freedoms* or the *Canadian Bill of Rights*. A certificate stating that the bill has been examined is then sent to the Clerk of the House of Commons and the Clerk of the Privy Council Office (See "Certification of Government Bills" in this chapter). The Minister of Justice is required to report any inconsistency to the House of Commons at the first convenient opportunity.

Second Reading (House of Commons)

This stage involves debate on the principle of the bill. No amendments to the bill are allowed. This stage concludes with a vote.

STEP	**ACTIVITIES AND PRODUCTS**
Support for the Minister	The Minister may request departmental officials (including members of the legislative project team) to be available in the government lobby. The program ADM decides which officials will attend. The departmental legal adviser is usually asked to attend.
Speeches	Minister's legislative assistant usually determines the number of speeches required. In addition to the Minister's speech, two to four speeches of about 10 minutes are usually required at this stage. The speeches are usually discussed at a speech meeting involving the communications branch, the legislative project team and the Minister's legislative assistant.
Debate	Legislative project team members prepare and send an analysis and highlights of the debate to senior management, program officials, parliamentary relations officials, the departmental legal adviser and the Minister's legislative assistant. This involves • describing the issues raised and including relevant segments of the debate; • preparing a list of questions that flow from these issues; • reviewing the questions in the context of existing Qs and As.

Committee Stage (House of Commons)

A committee of the House studies the bill at this stage. It hears witnesses and then reviews the bill clause by clause. The committee may adopt amendments during its clause-by-clause review. When the review is complete, the committee prepares a report to the House, including any amendments it has adopted. The committee chair tables the report in the House.

STEP	**ACTIVITIES AND PRODUCTS**
Preparation	The Minister's briefing book should be reviewed and updated as required after second reading debate. The departmental communications branch prepares material for an opening statement by the Minister to the committee. The Minister may also request a briefing from the project team.

STEP	ACTIVITIES AND PRODUCTS
Contact committee clerk	Contact the committee clerk to find out when committee will review the bill and who will be appearing as witnesses. Notify the Minister's office, senior management, program officials, parliamentary relations officials and departmental legal adviser of the progress of the bill.
Information packages to committee clerk	The legislative project team provides an additional 30+ copies of the information packages to the committee clerk, either directly or via the Minister's office (as directed by the Minister's legislative assistant). All material must be provided in both official languages.
Regulation-making authority	If the bill contains regulation-making authority, the departmental officials should be prepared to answer questions about what regulations would be made.
Identifying and assisting departmental witnesses	The Program ADM decides which program officials will appear as witnesses before Committee or accompany the Minister or Parliamentary Secretary. Legislative project team provides program officials appearing as witnesses with background material, analysis of debates and additional questions raised during the debates. Departmental officials are required to answer questions on technical or complex policy matters, but do not defend policy or engage in debate on it.
Potential public witnesses	Legislative project team prepares a list of potential public witnesses and their positions on the bill.
Minister's appearance	The Minister or Parliamentary Secretary appears before the committee to deliver an opening statement and answer questions from committee members. All statements must be bilingual and written copies are given to the Clerk of the Committee and to the interpreters.
Other witnesses	Witnesses deliver short (five-minute) opening statements and answer questions from committee members. All statements must be bilingual and written copies are given to the Clerk of the Committee and to the interpreters.
Clause-by-clause review and amendments	Amendments may not go beyond the principle of the bill as adopted at second reading. The scope for amendment is greater when a bill is referred to a committee before second reading. Government amendments are prepared, or at the very least reviewed, by the bill drafters and reviewed by jurilinguists and legislative revisors. • Amendments that are merely technical may be agreed to by the sponsoring Minister with no need for Cabinet approval. • Amendments that have an impact on the policy approved by Cabinet or that raise policy considerations not previously considered by Cabinet are subject to the same procedure as the initial proposal, namely, the submission of a Memorandum to Cabinet for consideration by the original policy Committee of Cabinet and approval by the Cabinet. • In exceptional cases, urgent major amendments need not follow the full procedure referred to above, but may be approved by the Prime Minister and the Chair of the relevant policy committee of Cabinet together with other interested Ministers. In the case of amendments requiring policy approval, PCO must be contacted to make the necessary arrangements. The Parliamentary Secretary generally proposes Government amendments by filing

STEP	**ACTIVITIES AND PRODUCTS**
	them with the committee clerk before clause-by-clause review. Program officials should be prepared to comment on amendments proposed by the committee members. They should prepare a written (if time permits) critique of the proposed amendments, outlining their possible repercussions. They should also be prepared to explain why they should, or should not, be adopted.
Notification of outcome	Legislative project team notifies the Minister's office, Parliamentary Secretary, senior management, program officials, legal adviser and parliamentary relations officials of the outcome of the hearing, the clause-by-clause review of the bill and the tabling of the committee's report in the House.
Committee of the whole house	A committee of the whole is used for appropriation bills and, exceptionally, for other bills to expedite their passage. Proceedings take place on the floor of the House. Up to three officials are allowed on the Commons floor to assist the Minister on factual or technical questions at the Minister's request, but they cannot speak in the debate.

Report Stage (House of Commons)

This stage involves the debate of the bill as amended by Committee. Further amendments may be proposed.

STEP	**ACTIVITIES AND PRODUCTS**
Notice of amendments	Notice of amendments must be given in the House of Commons *Notice Paper* no later than 6:00 p.m. the night before report stage begins. Additional amendments cannot be proposed after report stage has begun.
Government amendments	Government amendments are drafted or, at the very least, reviewed by Department of Justice drafters. They may also require Cabinet approval (see above: "Committee Stage—Clause-by-clause review and amendments").
Notice of amendments	The legislative project team reviews the daily order paper for notice of any non-government amendments and, if there are any, the team notifies the sponsoring Minister's office, senior management, program officials, parliamentary relations officials and the departmental legal adviser.
Responses to amendments	If there are non-government amendments proposed, the program officials prepare briefing materials (recommended government position and speaking notes) on each amendment. Departmental recommendations are forwarded to the sponsoring Minister's office. If the Minister wishes to support the amendment, Cabinet approval may be required (see above: "Committee Stage—Clause-by-clause review and amendments").
Support for Minister	During report stage, the Minister's office will usually request the support of officials in the government lobby. The program ADM decides which program officials will attend. The legal adviser also attends. If there are no amendments proposed at this stage, the House proceeds immediately to third reading after the vote on concurrence in the committee report.
Debate and motion for concurrence	Amendments to the bill as reported are debated and voted on. Then there is a vote on the motion for concurrence in the bill as reported and amended. If the bill is referred to committee before second reading, the debates at report stage and second reading are combined.

Interventions	While speeches as such are not usually required, short statements, quotes, etc., may be prepared for the Minister or other Government members wishing to intervene at this point.

Third Reading (House of Commons)

This stage involves a debate on the bill in its final form. No amendments to the bill are permitted.

STEP	**ACTIVITIES AND PRODUCTS**
Debate	Debate may begin no earlier than the next sitting day after the conclusion of report stage. However, if there are no report stage amendments, debate may begin immediately.
Speech	Although the Minister's speech is usually about 10 minutes, the actual length is determined by the Minister's legislative assistant, taking into account the complexities of the bill. It is discussed during a speech meeting organized by officials responsible for preparing the speech.
Briefing books	The legislative project team incorporates into the briefing books any changes or new information added at second reading, during committee review or at report stage . During debate at third reading, the Minister's office may request the support of officials in the government lobby. The program ADM decides which program officials attend. The legal adviser also attends.

In the Senate

Introduction and First Reading

STEP	ACTIVITIES AND PRODUCTS
Sponsoring Senator	The Leader of the Government in the Senate, in consultation with the Minister's office, identifies a sponsoring Senator to introduce the bill. Contact the office of the Leader of the Government in the Senate about briefings for the sponsoring Senator and the committee chair and about information sessions for opposition senators.
Briefing books to Senate house leader and sponsoring senator	Program officials prepare the briefing books and forward them to the Minister's office with a covering letter for the Minister's signature. This material is provided well before the First Reading in the Senate to the Leader of the Government in the Senate and to the Senator who sponsors the bill. They also prepare a summary of all major arguments raised during the House of Commons debate for the briefing books and prepare the speeches for use in the Senate. Ensure that copies of the bill kits (press release, copy of the bill, backgrounders) are provided to all senators.
Brief sponsoring senator	The Minister's legislative assistant arranges for program officials and the legal adviser to brief the sponsoring Senator.
Introduction	No notice of introduction is required. L&HP/C makes the arrangements for introduction in consultation with the office of the Leader of the Government in the Senate and the sponsoring Minister and with the approval of the Leader of the Government in the House of Commons.
First reading	There is no debate and no vote at this point.

Second Reading (Senate)

The debate at second reading focuses on the principle of the bill and is followed by a vote.

STEP	ACTIVITIES AND PRODUCTS
Speech for sponsoring senator	Although usually a 10-minute speech, its actual length is determined by the Minister's legislative sssistant, taking into account the complexities of the bill. It is discussed during a speech meeting organized by officials responsible for preparing the speech.
Debate	The sponsoring Senator may request that program officials be present in the Senate Gallery. The program ADM decides which program officials attend. The legal adviser also attends. The legislative project team monitors the debate and provides a summary of the opposition's main arguments to the Minister's office, the Parliamentary Secretary, senior management, program officials, the legal adviser and parliamentary relations officials. The program officials update the sponsoring Senator's briefing book.

Committee Stage (Senate)

A committee of the Senate studies the bill at this stage. It hears witnesses and then reviews the bill clause by clause. The committee may adopt amendments during its clause-by-clause review. When the review is complete, the committee prepares a report to the Senate, including any amendments it has adopted. The committee chair tables the report in the Senate.

STEP	ACTIVITIES AND PRODUCTS
Preparation	The briefing books should be revised and updated as required. The Minister's opening statement is also revised as required. The Minister may also request a briefing from the project team.
Contact committee clerk	Contact the committee clerk to find out when committee will review the bill and who will be appearing as witnesses. Notify the Minister's office, senior management, program officials, parliamentary relations officials and the departmental legal adviser of the progress of the bill.
Information packages to committee clerk	Forward approximately 20 updated information packages to the committee clerk for distribution to members. All material must be provided to the committee clerk in both official languages.
Identifying and assisting departmental witnesses	The program ADM decides which program officials are to appear before committee as witnesses or accompany the Minister (if he or she attends). The project team develops an analysis of the debates and an overview of additional questions raised during the debates and provides them to the departmental witnesses.
Minister's appearance	The Minister appears before the committee to deliver an opening statement and answer questions from committee members. All statements must be bilingual and written copies are given to the committee clerk and to the interpreters.
Committee deliberations	The legislative project team monitors hearings, assists departmental witnesses and government senators during the committee deliberations and prepares summary notes to be distributed to the Minister's office, the sponsoring senator, senior management, program officials, parliamentary relations officials and the departmental legal adviser.

STEP	**ACTIVITIES AND PRODUCTS**
Clause-by-clause review and amendments	Government amendments are prepared, or at the very least reviewed, by the Department of Justice drafters. • Amendments that are merely technical may be agreed to by the sponsoring Minister with no need for Cabinet approval. • Except in urgent cases, amendments that have an impact on the policy approved by Cabinet or that raise policy considerations not previously considered by Cabinet are subject to the same procedure as the initial proposal, namely, the submission of a Memorandum to Cabinet for consideration by the original policy committee of Cabinet and approval by the Cabinet. • Urgent major amendments need not follow the full procedure referred to above, but may be approved by the Prime Minister and the chair of the relevant policy committee of Cabinet together with other interested Ministers. In the case of amendments requiring policy approval, PCO must be contacted to make the necessary arrangements. The sponsoring Senator generally proposes Government amendments by filing them with the committee clerk before clause-by-clause review. Program officials should be prepared to comment on amendments proposed by the committee members. They should prepare a written (if time permits) critique of the proposed amendments, outlining their possible repercussions and be prepared to explain why they should, or should not, be adopted.
Committee of the whole house	If the bill is referred to a committee of the whole rather than a standing Senate committee, the Minister will usually be invited to appear before the Senate committee of the whole in the Senate Chamber. Two officials will accompany the Minister into the Senate Chamber and the Minister will give the opening statement.

Report Stage (Senate)

This stage involves a debate of the bill as amended by committee. Further amendments may be proposed.

STEP	**ACTIVITIES AND PRODUCTS**
Report stage	If there are no amendments, the report stands adopted. If there are amendments, there is a debate and a vote.
Responses to amendments	If there are non-government amendments proposed, the program officials prepare briefing materials (recommended government position and speaking notes) on each amendment. Departmental recommendations are forwarded to the sponsoring Minister's office. If the Minister wishes to support the amendment, Cabinet approval may be required (see above: "Committee Stage—Clause-by-clause review and amendments").

Third Reading (Senate)

This stage involves a debate on the bill in its final form. Amendments to the bill are permitted.

STEP	ACTIVITIES AND PRODUCTS
Speeches	A third reading speech is prepared for the sponsoring Senator (usually 10 minutes).
Debate and vote	The sponsoring Senator may request that program officials be in the Senate Gallery while he or she is speaking. The program ADM decides which program officials attend. The legal adviser also attends. If the bill receives third reading and has not been amended in the Senate, it is ready for Royal Assent. If there have been Senate amendments, the bill is returned to the House of Commons. The House of Commons can either concur in the amendments or reject them. If there is no agreement between the two Houses, representatives of the House of Commons and the Senate may meet to discuss how to resolve the matter.

Royal Assent

STEP	ACTIVITIES AND PRODUCTS
Timing	The Leader of the Government in the House of Commons determines the timing of Royal Assent in consultation with the Leader of the Government in the Senate and L&HP/C. Notify the Minister's office, senior management, program officials, the legal adviser and parliamentary relations officials of the timing.
Press release	The communications branch prepares a press release announcing that the bill has received Royal Assent.

Chapter 2.5
Coming into Force

Overview

This section supplements section 6 of the "Cabinet Directive on Law-making." It discusses how and when Acts come into force.

In this Chapter

- Coming into Force of Acts
- Activities and Products for Bringing an Act into Force

Audience

Officials responsible for the general administration of the Act or for preparing orders in council required to bring it into force or regulations necessary for its operation.

Key Messages

Bringing an Act into force is a critical step in its implementation and requires careful consideration and planning.

Coming into Force of Acts

On Royal Assent, a statute has the force of law unless it provides otherwise. Quite frequently, a statute provides that it, or any of its provisions, comes into force on a day or days to be fixed by order of the Governor in Council. This order is prepared by officials in the department that administers the Act and is submitted to the Special Committee of Council by the responsible Minister. If approved, the order is sent to the Governor General for signature and published in the *Canada Gazette*. A draft order should be submitted for approval well in advance of the day or days that it proposes for provisions to come into force.

Activities and Products for Bringing an Act into Force

This table sets out what is involved in bringing an Act into force.

STEP	ACTIVITIES AND PRODUCTS
Determine when the Act comes into force	An Act comes into force on Royal Assent, unless it says otherwise. If the Act says that it comes into force on a date to be fixed by the Governor in Council, determine what that date should be. This involves assessing whether any regulations or administrative arrangements are needed for the Act to operate. Coming into force dates cannot be established until these matters are settled.
Prepare draft order in council to bring Act into force	If the Act comes into force on a date fixed by the Governor in Council, prepare a draft of the necessary order in council with the assistance of the departmental legal adviser.
Send draft order in council to Minister for recommendation	Orders in council must be recommended by a Minister before they can be considered by the Cabinet.
Send the draft order in council to PCO	Send the draft order in council with the Minister's recommendation to the Assistant Clerk of the Privy Council (Orders in Council)
Statutory requirement for tabling	Notify parliamentary relations officials of any statutory requirements for tabling reports or other material in Parliament once a bill comes into force. Ensure that they follow up on these requirements.
Regulations and other delegated legislation or directives	Essential elements of a legislative scheme are sometimes provided by regulations or other delegated legislation or directives. Without them, the scheme cannot operate.
Implementation	These activities are specific to each department and each legislative initiative.

Chapter 2.6
Post-enactment Review

Overview

This chapter encourages officials to conduct a review of each legislative project once the bill has been enacted by Parliament.

Audience

Legislative project managers and other officials who were involved in policy development and in the preparation and enactment of a bill.

Key Messages

A review of the legislative project is indispensable for improving the management and execution of future projects.

Post-enactment Review: Issues to be considered

Evaluating the performance of the legislative project team against its legislative plan is an essential part of all project planning. Once a bill has been passed, the team should spend some time looking at what happened and why. You may have to do this at several stages, calling together the team members at various levels.

Suggested issues to cover during a post-enactment review are:

- *Resources*: Were they sufficient?
- *Infrastructure*: Was it adequate?
- *Support*: Did the team successfully mobilize all areas of the department needed to support the project (for example, officials responsible for communications, consultation and parliamentary relations)?
- *Cooperation*: Did the team work successfully with the Minister's office and with parliamentary personnel?
- *Planning*: Was it accurate?
- *Project control and management*: Was the project well managed?

Part 3

Making Regulations

Overview

This part provides an overview of the regulatory process and is intended to situate the process of making regulations within the broader context of making laws. Persons directly involved in the development and the processing of regulations should refer to the *Regulatory Policy* and the Process Guides at http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&Page=Publications.

In this part

- What are regulations?
- What is the legal framework for regulations?
- What is the policy framework for regulations?
- Summary of the regulatory process

Audience

All Government officials involved in the law-making process and other interested persons.

Key Messages

- The *Statutory Instruments Act* and the *Regulatory Policy* govern the making of regulations.
- The *Statutory Instruments Act* establishes a process designed to ensure that regulations are made on a legally secure foundation and are accessible through the *Canada Gazette*.
- The *Regulatory Policy* establishes requirements for a Regulatory Impact Analysis as a means of ensuring that the Government's regulatory activity serves the public interest, particularly in the areas of health, safety, the quality of the environment and economic and social well-being.
- Ensuring that the public's money is spent wisely is also in the public interest. The Regulatory Impact Analysis also involves weighing the benefits of alternatives to regulation, and of alternative regulations, against their cost, and focusing resources where they can do the most good.
- To these ends, the federal government is committed to working in partnership with industry, labour, interest groups, professional organizations, other governments and interested individuals.

What are regulations?

Regulations are a form of law, often referred to as delegated or subordinate legislation. Like Acts, they have binding legal effect and usually state rules that apply generally, rather than to specific persons or situations. However, regulations are not made by Parliament. Rather, they are made by persons or bodies to whom Parliament has delegated the authority to make them, such as the Governor in Council, a Minister or an administrative agency. Authority to make regulations must be expressly delegated by an Act. Acts that authorize the making of regulations are called enabling Acts.

An Act generally sets out the framework of a regulatory scheme and delegates the authority to develop the details and express them in regulations.

Most regulations are designated as such in the Act that authorize them to be made. However, Acts sometimes authorize the making of documents that have the same legislative effect, but which are called by another name, for example, "by-laws," "rules," "tariffs," "ordinances" or "orders." Usually, these documents are made in the same way as regulations and are subject to the same policy and legal constraints.

What is the legal framework for regulations?

A regulation-making authority does not have a free hand in making regulations. There are a number of legal constraints, including the Constitution and other generally applicable laws discussed in Chapter 1.2 "Legal Considerations". One of the most important of these for regulations is the *Statutory Instruments Act* (SI Act) and the *Statutory Instruments Regulations* (SI Regulations), which are made under it. They set out three basic legal requirements for making regulations:

- legal examination,
- registration,
- publication in the *Canada Gazette.*

Enabling Acts provide an additional source of legal constraints. Regulations must stay within the scope of the authority that the enabling Act grants and must not conflict with it or restrict or extend the scope of its application.

What is the policy framework for regulations?

The *Regulatory Policy* of the Government of Canada provides the primary policy framework for making regulations. Its objective is to ensure that use of the government's regulatory powers results in the greatest net benefit to Canadian society. It states that regulatory authorities must ensure that:

1. Canadians are consulted, and that they have an opportunity to participate in developing or modifying regulations and regulatory programs.

2. They can demonstrate that a problem or risk exists, federal government intervention is justified and regulation is the best alternative.

3. The benefits outweigh the costs to Canadians, their governments and businesses. In particular, when managing risks on behalf of Canadians, regulatory authorities must ensure that the limited resources available to government are used where they do the most good.

4. Adverse impacts on the capacity of the economy to generate wealth and employment are minimized and no unnecessary regulatory burden is imposed. In particular, regulatory authorities must ensure that:

   - information and administrative requirements are limited to what is absolutely necessary and that they impose the least possible cost;
   - the special circumstances of small businesses are addressed; and
   - parties proposing equivalent means to conform with regulatory requirements are given positive consideration.

5. International and intergovernmental agreements are respected and full advantage is taken of opportunities for coordination with other governments and agencies.

6. Systems are in place to manage regulatory resources effectively. In particular, regulatory authorities must ensure that:

   - the Regulatory Process Management Standards are followed;
   - compliance and enforcement policies are articulated, as appropriate; and
   - resources have been approved and are adequate to discharge enforcement responsibilities effectively and to ensure compliance where the regulation binds the government.

7. Other directives from Cabinet concerning policy and law making are followed such as:

- *Cabinet Directive on Law-making,*
- *1999 Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals* http://www.ceaa-acee.gc.ca/0012/0006/sea_e.htm,
- *Cost Recovery and Charging Policy* http://www.tbs-sct.gc.ca/Pubs_pol/opepubs/TB_H/CRP_e.html.

The Special Committee of Council (a committee of the Cabinet) is responsible for the *Regulatory Policy.* The Regulatory Affairs Division of the Regulatory Affairs and Orders in Council Secretariat of the Privy Council Office supports the Special Committee in this responsibility by providing advice, developing guides, supporting capacity-building to help regulatory authorities comply with the policy, and monitoring the effectiveness of this policy.

Summary of the Regulatory Process

Most regulations and some other documents have to meet the requirements of a series of steps known as the regulatory process. This process is a combination of requirements that flow from the legal and policy frameworks. It includes the following steps:

- development of a regulatory proposal by a department responsible for an enabling Act or an administrative agency or other body that has regulation-making authority (sponsoring department or agency),
- central agency review (by Privy Council Office, Treasury Board Secretariat, Department of Justice);
- pre-publication;
- making or approval;
- registration;
- coming into force;
- publication;
- distribution;
- parliamentary scrutiny.

Who is involved in the process?

The following are the main participants in the regulatory process:

- the authority that "makes" or "approves" the regulation
  - usually the "Governor in Council," which is the Governor General acting on the advice of the Privy Council (this advisory role is usually exercised by the Special Committee of Council)
  - sometimes another Cabinet committee (such as the Treasury Board) or a particular Cabinet minister,
  - sometimes an administrative agency, such as the Canadian Radio-television and Telecommunications Commission, or other body;
- the Minister and the officials in the sponsoring department (in the case of Governor in Council or ministerial regulations) or the officials in the sponsoring agency (in the case of regulations made by an agency);
- the Clerk of the Privy Council;
- the Regulatory Affairs and Orders in Council Secretariat of the Privy Council Office;

- the Deputy Minister of Justice;
- the Regulations Section of the Department of Justice;
- the Treasury Board Secretariat;
- the Canada Gazette Directorate of the Department of Public Works and Government Services;
- the Standing Joint Committee of the Senate and the House of Commons for the Scrutiny of Regulations.

What documents are subject to the regulatory process?

The regulatory process applies to most regulations, as defined in the *Statutory Instruments Act* (SI Act). Four types of documents are regulations:

- documents described as "regulations" in an Act;
- rules, orders and regulations governing the practice or procedure in proceedings before a judicial or quasi-judicial body established by or under an Act;
- statutory instruments (as defined in the SI Act) made in the exercise of a legislative power conferred by or under an Act; and
- statutory instruments (as defined in the SI Act) for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act.

Some regulations are not subject to the regulatory process. They are wholly or partially exempted by their enabling Act or by the *Statutory Instruments Regulations.*

The Regulations Section of the Department of Justice provides advice on whether documents are regulations. Information on this question is also found in Part 2, section 2 of the *Federal Regulations Manual* (which is published by the Regulations Section).

The legal requirements of registration and publication (but not the policy requirements) also apply to a second group of documents. These include statutory instruments that fall outside the definition of "regulation" (for example, an order fixing the day on which an Act comes into force). Although there is no legal requirement for the examination of these documents, in practice the Regulations Section examines them as well.

Conception and development of regulations

Having the authority to make a regulation does not justify making it. The requirements of the *Regulatory Policy* must also be met. This includes demonstrating that a problem or risk exists, that the

Government should intervene and that regulation is the best option. A regulation may not be the best tool or the only one to be used to achieve a policy objective.

Before deciding whether to regulate a particular field of activity, the sponsoring department or agency must assess all the possible solutions for achieving its objectives. If it concludes that a regulation should be pursued, it must initiate a process of planning, analysis and public consultation in accordance with the *Regulatory Policy*.

Early notice of proposed major regulations is given in departmental and agency annual *Reports on Plans and Priorities* submitted to Parliament. The extent to which a regulation has achieved its stated objective is subsequently reported to Parliament in the annual departmental *Performance Reports*.

The department or agency then drafts its regulatory proposal with the assistance of its legal advisers and, in some cases, the Regulations Section of the Department of Justice.

Regulatory Impact Analysis

An analysis of the expected impact of each regulatory initiative must be done. The results of this analysis are summarized in a Regulatory Impact Analysis Statement (RIAS). Each section of the RIAS implements one or more elements of the *Regulatory Policy*. The RIAS is, in effect, a public accounting of the need for each regulation in terms of this policy.

The RIAS explains:

- the elements of the regulatory proposal, including what problems or situations it addresses and what it is meant to achieve;
- what alternatives to regulation have been considered;
- what are the anticipated costs and benefits of the regulations;
- what consultations have been carried out and what opportunities Canadians have had to be heard;
- what is the response of the department or agency to the concerns voiced or suggestions made;
- what mechanisms are built in to ensure compliance with the regulations once they are in force;
- how the effectiveness of the regulations will be measured.

The RIAS serves the same purpose as a Memorandum to Cabinet, used by ministers to make informed decisions on the making of laws. The RIAS also becomes a public document that helps the Government to be accountable to Canadians and parliamentarians in the exercise of delegated authority for the making of laws. Each of these audiences demands that the RIAS be prepared with close attention, ensuring that material submitted for consideration:

- is written in simple, clear, complete and concise language that the general public can easily understand;
- describes the problem or situation that it is intended to address; and
- describes the potential impact of the proposal and the measures to be taken to minimize any adverse effects.

Detailed guidance to the preparation of a RIAS may be found in the *RIAS Writers' Guide* (http://www.pco-bcp.gc.ca/raoics-srdc/publications_e.htm). This guide explains the objectives of the RIAS and some approaches that will result in an excellent finished product.

For regulations that have to be made or approved by the Governor in Council, a communications plan is required and, if needed, a supplementary note. The communications plan covers, among other things, the strategy to be used by the department or agency to bring the regulatory measures to the attention of the groups affected once they are made. As well, confidential information to support decision making should be placed in a supplementary note and be separate from the RIAS.

Central Agency Review

Clerk of the Privy Council and Deputy Minister of Justice

The roles of the Clerk of the Privy Council and the Deputy Minister of Justice are set out in the SI Act. They are supported in these roles by the Regulatory Affairs and Orders in Council Secretariat of the Privy Council Office and by the Regulations Section of the Department of Justice.

Regulatory Affairs and Orders in Council Secretariat

The Regulatory Affairs and Orders in Council Secretariat (RAOIC) is responsible for monitoring, coordinating and advising on regulatory and Orders in Council issues and policies, and their consistency with economic, social and federal-provincial policies. The RAOIC secretariat is divided into the Regulatory Affairs Division and the Orders in Council Division. The secretariat provides support to the Special Committee of Council (SCC) with respect to regulatory and Orders in Council matters.

The prime responsibilities of the Regulatory Affairs Division include:

- the monitoring of regulatory proposals;

- the provision of substantive support to SCC through analysis, briefing, and advice with respect to regulatory proposals; and
- support for the implementation and development of the *Regulatory Policy*.

In more specific terms, it reviews each regulatory proposal from an overall policy perspective and may request additional information or analyses from the sponsoring department prior to the proposal being submitted to the SCC for consideration.

The Orders in Council Division's main responsibilities include:

- the management of the approval process for all Orders in Council, regulations, and other statutory instruments;
- the provision of secretariat services to the SCC;
- the provision of advice on the use of Orders in Council and/or Instruments of Advice;
- the production and distribution of Orders in Council;
- the registration and publication of regulations in Part II of the *Canada Gazette* (see http://canada.gc.ca/gazette/gazette_e.html); and
- the maintenance of records of approved Orders in Council, the Consolidated Index of Statutory Instruments, and a number of Oath Books (see http://canada.gc.ca/howgoc/oic/oic_e.html).

Regulations Section

The tasks of the Deputy Minister under the SI Act are carried out by the Regulations Section, which examines all proposed regulations submitted by departments and agencies (except those exempted from examination), to ensure that:

- they are authorized by the enabling statute;
- they do not constitute an unusual or unexpected use of the authority under which they are to be made;
- they do not trespass unduly on existing rights and freedoms and are not, in any case, inconsistent with the *Canadian Bill of Rights* or the *Canadian Charter of Rights and Freedoms*; and
- their form and drafting are in accordance with established standards.

When it has finished its examination, the Regulations Section stamps the draft regulations. If the solution found for any legal problems in the file involves some legal risk, the Regulations Section writes to the department or agency explaining what the risk is. If serious legal issues remain unsettled, the Regulations Section reports its concerns to the Clerk of the Privy Council.

Regulations are not invalid just because they have been made without being examined by the Regulations Section. However, the Clerk can refuse to register them and the Governor in Council can, on the recommendation of the Minister of Justice, repeal all or part of any regulation that was made without having been examined.

Treasury Board Secretariat

The Treasury Board Secretariat examines draft regulations that, under their enabling statutes, require Treasury Board approval or recommendation. It also examines regulations that are liable to have significant financial implications, including those related to cost recovery programs.

Pre-publication

The purpose of pre-publication is to give those who are interested in a regulatory proposal an opportunity to determine the extent to which the proposal is in keeping with previous consultations.

A Cabinet Directive of 1986 requires draft regulations to be pre-published in Part I of the *Canada Gazette*, before they can be made. In some cases this requirement is imposed by the enabling Act. Part I of the *Canada Gazette* can be accessed at http://canada.gc.ca/gazette/hompar1_e.html.

An exemption from pre-publication may be granted unless pre-publication is required by the enabling Act. For regulations made or approved by the Governor in Council, exemptions may be granted by the Special Committee of Council and are considered on a case by case basis. For more information on exemptions, see the *Federal Regulatory Process*. For regulations made by a Minister or agency, exemptions may be granted by the Minister or agency.

The pre-publication requirement does not apply to documents that are not regulations, unless the enabling Act says so.

Draft regulations must be approved before they are pre-published. If the regulations are made or approved by the Governor in Council, the approval is given by the Special Committee of Council. If they are made by a minister or agency, the approval is given by the minister or agency. The RIAS is published along with the draft regulations.

When draft regulations are pre-published, interested persons are allowed a period of time to express their views. The period is usually 30 days in the case of regulations pre-published under the Cabinet policy. In other cases, the length of pre-publication may be specified in the enabling Act. The pre-publication period may also be determined by international agreements, such as the World Trade Organization agreements and the North American Free Trade Agreement. In general, it is both prudent and a requirement of the *Regulatory Policy* that regulations covered under international trade agreements be pre-published for a minimum of 75 days.

Making or Approval of Regulations

A regulation is "made" when it is officially established by the regulation-making authority. This is usually done through a separate document called an executive order. The regulation is attached to the order as an annex.

If the authority is the Governor in Council, the executive order is an "order in council" and the regulation is made when the Governor General indicates that the order in council is made. If the authority is a minister, the executive order is a "ministerial order" and the regulation is made when the minister signs the ministerial order. In the case of an agency or other body, the executive order is usually a resolution or other document, depending on its decision-making process.

In the case of regulations made by the Governor in Council, the sponsoring department must seek the approval of the responsible Cabinet committee, which is usually the Special Committee of Council. In preparing this submission, the department must augment its original RIAS documents with information relating to the comments received during the pre-publication period, any actions taken to address those comments and the rationale for the department's response.

Sometimes an enabling Act not only authorizes someone to "make" regulations, it also says that some other person or body must "approve" them. For example, the enabling provision may say "The Commission may, with the approval of the Governor in Council, make regulations ..." Approval is given through an executive order, such as an order in council or a ministerial order.

Registration

The SI Act requires regulations to be transmitted to the Clerk of the Privy Council within seven days after they are made so that they can be registered, unless the SI Regulations exempt them from this requirement because they are too numerous.

For regulations, the Clerk records the title of the regulation, the name of the regulation-making authority, the source of the power to make the regulation, the date of making and the date of registration, and assigns it a number, preceded by the designation “SOR.” For other documents, the Clerk records much the same information and assigns each its own number, preceded by the designation “SI”. In practice, the Clerk's responsibilities are fulfilled by the Orders in Council Division of the Regulatory Affairs and Orders in Council Secretariat.

Coming into force

Registration is a crucial step in the case of regulations because it determines when they take effect. Regulations that must be registered come into force on the day they are registered, unless the enabling statute or the regulations themselves specify another commencement date (see subsection 6(2) of the *Interpretation Act*). Other regulations and documents come into force on the day they are made, unless they specify another commencement date.

Commencement dates before the making of a regulation or other document can only be specified if there is authority to do so in the enabling Act. Such a commencement date makes a regulation or document retroactive and clear statutory authority is required for this.

Publication

The SI Act and SI Regulations provide for the publication of regulations in Part II of the *Canada Gazette* within 23 days after their registration. Some regulations are exempt from publication. They are listed in section 15 of the *SI Regulations*.

The *Canada Gazette* is published by the Queen's Printer, whose responsibilities in this regard are carried out by the Canada Gazette Directorate of the Department of Public Works and Government Services.

What if a regulation is not published even though it is supposed to be? Failure to publish it does not make it invalid, but it prevents conviction for an offence of contravening the regulation. The reason is the constitutional principle of the rule of law: the terms of the law must be knowable, not secret. If a regulation is not published, people cannot be presumed to have had any way of finding out what their rights and responsibilities were under it.

There is one exception. Someone who has contravened an unpublished regulation can be convicted if the regulation is exempt from publication or if it expressly provides that it applies according to its terms before it is published in the *Canada Gazette*. However, in such cases it must also be proved that reasonable steps had been taken to bring the gist of the regulation to the notice of those likely to be affected by it.

Distribution

All Orders in Council, including regulations, are made available to the public three working days after they have been approved by the Governor General. A list of all approved orders is available at http://canada.gc.ca/howgoc/oic/oic_e.html. In addition, electronic versions of regulations and other documents published in Part II of the *Canada Gazette* are available at http://canada.gc.ca/gazette/hompar2_e.html.

Parliamentary Scrutiny

The Standing Joint Committee for the Scrutiny of Regulations monitors the exercise of regulatory power on behalf of Parliament. Its mandate, set out in section 19 of the SI Act, is to review regulations and other statutory instruments after they are made.

The Committee checks the instruments against the criteria that the Senate and the House of Commons have approved at the beginning of each session of Parliament. Some of these criteria are the same as those applied by the Regulations Section of the Department of Justice in its examination of proposed regulations.

When the Committee finds a problem with a statutory instrument, it tells the regulation-making authority and suggests solutions. If the Committee and the regulation-making authority are unable to agree on a solution, the Committee may make a report drawing the matter to the attention of both Houses of Parliament. If the instrument is made by the Governor in Council or a minister, the Committee is also authorized, under subsection 123(1) of the *Standing Orders of the House of Commons*, to make a report to the House of Commons proposing the disallowance of the instrument. A disallowance resolution, if not rejected, becomes an Order of the House enjoining the Governor in Council or minister to revoke the statutory instrument.

References

- *Regulatory Policy* and the Policy and Process Guides of the Regulatory Affairs and Orders in Council Secretariat of the Privy Council Office http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&Page=Publications,
- *Federal Regulations Manual*, Regulations Section of the Department of Justice.

Appendix
Reference Material

Overview

This appendix provides a comprehensive list of reference materials and other documents that may be useful to anyone participating in the law-making process.

In this Appendix

Sources of additional reference material on:

- Parliamentary Democracy
- Preparing Legislation
- Parliamentary Process—General
- Parliamentary Process—House of Commons
- Parliamentary Process—Senate of Canada
- Regulatory Process

Audience

Everyone

Key Messages

There are many places to look for additional information.

Parliamentary Democracy

TITLE	AUTHOR	REFERENCE AND LANGUAGE	ASSESSMENT
How Canadians Govern Themselves, 4th ed. 1997	Eugene A. Forsey	http://www.parl.gc.ca/information/about/process/library/forsey/how-e.htm Bilingual	Easily understood
Parliamentary Process – Canada's Parliament at Work	Parliament of Canada	http://www.parl.gc.ca/common/AboutParl_Process.asp?Language=E Bilingual	Portal to a wide range of information about the parliamentary process
The Question of Confidence in Responsible Government, 1985	Eugene A. Forsey and G.C. Eglinton	Printed English	Technical
Parliament: Canada's Democracy and How it Works, 1995	Maureen McTeer	ISBN 0-394-22006-4 English	Easily understood
The Parliament of Canada, 1987	C.E.S. Franks	ISBN 0-802-05735-7 English	Good introduction
The Law-Making Process, 1991	Law Clerk and Parliamentary Counsel of the Senate	Printed Bilingual	Easily understood

Preparing Legislation

TITLE	AUTHOR	REFERENCE AND LANGUAGE	ASSESSMENT
The Role and Structure of the Privy Council Office, current	Privy Council Office	http://www.pco-bcp.gc.ca/default.asp?Page=Publications&Language=E&doc=Role/role_e.htm Bilingual	Easily understood
Memoranda to Cabinet: A Drafters' Guide	Privy Council Office	http://www.pco-bcp.gc.ca/default.asp?Language=E&Page=publications&Sub=mc&Doc=mc_e.htm Bilingual	Easily understood
Responsibility in the Constitution, 1993	Privy Council Office	ISBN 0-662-58782-0 Bilingual	Easily understood
Designing Regulatory Laws that Work	Department of Justice (Constitutional and Administrative Law Section)	Printed Bilingual	Detailed and technical
Manual for Designing Administrative Tribunals, 1998	Department of Justice (Constitutional and Administrative Law Section)	Electronic version available on the Department of Justice Intranet Bilingual	Detailed and technical
Composition of Legislation, 2nd ed., 1976	E. A. Driedger	ISBN 0-660-00443-7 English	Detailed and technical
Legislation Deskbook	Department of Justice (Legislative Services Branch)	Electronic version available on the Department of Justice Intranet Bilingual	Detailed and technical
Legistics	Department of Justice (Legislative Services Branch)	Printed English	Detailed guidance on drafting in English

Parliamentary Process–General

TITLE	AUTHOR	REFERENCE AND LANGUAGE	ASSESSMENT
Making Canada's Laws, 1997	Senate	http://www.parl.gc.ca/information/about/process/senate/senatetoday/making_laws-e.htm Bilingual	Easily understood
Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament, 22nd ed., 1997	Sir D. Limon, et al.	ISBN 0-406-89587-2 English	Technical
Bourinot's Parliamentary Procedure and Practice in the Dominion of Canada, 4th ed., 1916	John Bourinot	ISBN 0-716-52021-4 English	Technical
Glossary of Parliamentary Procedure, 2nd ed., 1997	House of Commons	ISBN 0-662-63075-0 http://www.parl.gc.ca/information/about/process/house/glossary/gloss-e.htm Bilingual	Explanation of terminology
The Legislative Process, 1992	House of Commons	ISBN 0-662-58828-2	Good introduction
Parliamentary Calendar, current	Library of Parliament	http://www.parl.gc.ca/information/about/process/house/calendar/calpre-e.htm Bilingual	Easily understood
Canadian Parliamentary Handbook, 1998	John Bejermi	ISBN 0-714-8143 Bilingual	Technical
Canadian Parliamentary Guide, 1997	Parliament	ISBN 0-969-31580-5	Easily understood
Notes on the Responsibilities of Public Servants in relation to Parliamentary Committees, 1990	Privy Council Office	http://www.pco-bcp.gc.ca/default.asp?Page=Publications&Language=E&doc=pco-notes/cover_e.htm Bilingual	Easily understood
Guidelines for Preparing Government Responses to House of Commons Committee Reports	Privy Council Office	http://www.pco-bcp.gc.ca/default.asp?Page=Publications&Language=E&doc=legislation/govresp_e.htm	Easily understood

Parliamentary Process—House of Commons

TITLE	AUTHOR	REFERENCE AND LANGUAGE	ASSESSMENT
Standing Orders of the House of Commons, current	House of Commons	http://www.parl.gc.ca/information/about/process/house/standingorders/toc-e.html Bilingual	Technical
Annotated Standing Orders of the House of Commons, 1989	House of Commons	ISBN 0-660-54620-5	Technical
Précis of Procedure, 5th ed., 1997	House of Commons	http://www.parl.gc.ca/information/about/process/house/precis/titpg-e.htm Bilingual	Easily understood
House of Commons Procedure and Practice, 2000	R. Marleau, C. Montpetit	ISBN 2-89461-378-4 Bilingual	Technical
Beauchesne's Rules and Forms of the House of Commons of Canada, 6th ed., 1989	A. Fraser, et al.	ISBN 0-459-32481-0 Bilingual	Technical
The House of Commons at Work, 1993	John Fraser	ISBN 2-893-10164-X English	Easily understood
Committee Business, current	House of Commons	http://www.parl.gc.ca/common/committee.asp?Language=E&Parl=37&Ses=1	Easily understood
Time limits on Speeches, Statements and Debates, 1994	House of Commons	Printed Journals Branch: Tel.(613) 996-1086 Bilingual	Easily understood
A User's Guide to House of Commons Publications, 1993	House of Commons	ISBN 0-662-60087-8 Bilingual	Easily understood
Order Paper, Journals, Hansard, Proceedings of Committees	House of Commons	http://www.parl.gc.ca/english/ebus.html Bilingual	Easily understood, Some technical
House of Commons Calendar	House of Commons	http://www.parl.gc.ca/information/about/process/house/calendar/calpre-e.htm Bilingual	Easily understood

TITLE	AUTHOR	REFERENCE AND LANGUAGE	ASSESSMENT
List of Members of the House of Commons	House of Commons	http://www.parl.gc.ca/common/SenatorsMembers_house.asp?Language=E&Parl=37&Ses=1&Sect=hoccur Bilingual	Easily understood
Privilege in the Modern Context, 1990	House of Commons	ISBN 0-662-57585-7 Bilingual	Easily understood
Privilege in the Historical Context, 1990	House of Commons	ISBN 0-662-57584-9 Bilingual	Easily understood
Committees of the House of Commons: A Practical Guide, 5th ed., 1997	House of Commons	ISBN 0-662-63076-9 Committees Branch: Tel. (613) 996-1190 Bilingual	Easily understood
A Guide for Witnesses Appearing Before Committees of the House of Commons	House of Commons	http://www.parl.gc.ca/infocom/documents/guide-witness-e.htm Bilingual	Easily understood
Parliamentary Privilege in Canada, 1997	J. Maingot	ISBN 0-773-51718-9 Bilingual	Technical

Parliamentary Process—Senate

TITLE	**AUTHOR**	**REFERENCE AND LANGUAGE**	**ASSESSMENT**
The Senate Today	Senate	http://www.parl.gc.ca/information/about/process/Senate/senatetoday/senate_today-e.htm Bilingual	Easily understood
The Canadian Senate in Focus (1987-1993), 1993	Senate	Printed Committees Directorate: Tel.: (613) 990-0088 English	Good comparison of Senate and House of Commons
Rules Of The Senate Of Canada, 1996	Senate	http://www.parl.gc.ca/information/about/process/senate/rules-e/senrules-e.htm Bilingual	Technical
Proceedings of the Committee on Standing Rules and Orders Standing Rules and Orders, Issue No. 1, 1991	Senate	Printed ISBN 1187-2489 Bilingual	Clear explanation of 1991 rules
Party Standings and Senators	Senate	http://www.parl.gc.ca/common/SenatorsMembers_senate.asp?Language=E&Parl=37&Ses=1&Sect=sencur Bilingual	Easily understood
Order Paper, Minutes, Committee hearings and proceedings	Senate	http://www.parl.gc.ca/english/ebus.html Bilingual	Easily understood
A Guide to Witnesses Appearing before Senate Committees	Senate	http://www.parl.gc.ca/37/1/parlbus/commbus/senate/com-e/pub-e/witness-e.htm Bilingual	Easily understood
List of Standing, Special and Joint Committees of the Senate	Senate	http://www.parl.gc.ca/Common/Committee_SenList.asp?Language=E&Parl=37&Ses=1. Bilingual	Easily understood

Regulatory Process

TITLE	AUTHOR	REFERENCE AND LANGUAGE	ASSESSMENT
Government of Canada *Regulatory Policy*	Privy Council Office (Regulatory Affairs and Orders in Council Secretariat)	Bilingual http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&Page=Publications&Sub=GovernmentofCanadaRegula	Easily understood
Guide to the Regulatory Process	Privy Council Office (Regulatory Affairs and Orders in Council Secretariat)	Bilingual http://www.pco-bcp.gc.ca/raoics-srdc/default.asp?Language=E&Page=Publications&Sub=RegulatoryProcessGuide	Easily understood
Federal Regulations Manual, 1998	Department of Justice (Regulations Section)	Bilingual	Technical, but easily understood